Islamic Courts in Indonesia

A Study in the Political Bases of Legal Institutions

by Daniel S. Lev

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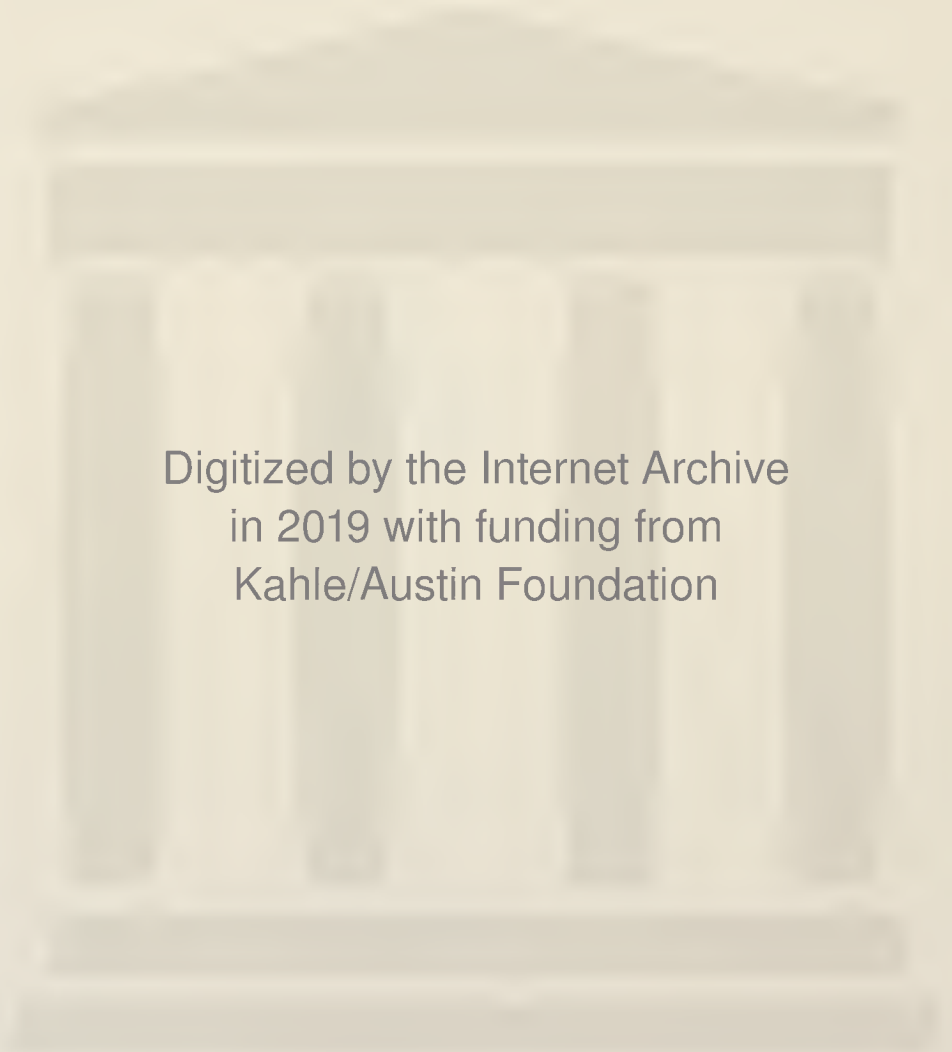

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ISLAMIC COURTS IN INDONESIA

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Islamic Courts in Indonesia

A STUDY IN THE POLITICAL BASES
OF LEGAL INSTITUTIONS

by Daniel S. Lev

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To Harry J. Benda

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PANCASILA

KETUHANAN YANG MAHA ESA

KEMANUSIAAN YANG ADIL DAN BERADAB

PERSATUAN INDONESIA

KERAKYATAN YANG DIPIMPIN OLEH HIKMAT KEBIJAK-SANAAN DALAM PERMUSYAWARATAN / PERWAKILAN

KEADILAN SOSIAL BAGI SELURUH RAKYAT INDONESIA

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Preface

THIS BOOK STARTED AS A CHAPTER IN ANOTHER BOOK ABOUT the politics and sociology of legal change in Indonesia. The chapter got out of hand the more I tried to explain why, despite all apparent odds, Islamic courts in Indonesia not only survived but in some ways grew stronger, while in other Islamic countries religious legal institutions were being abolished or seriously constricted. The search for an explanation, and for some understanding of the limits of change in the Islamic judiciary, took me back to the purpose of the original study. This purpose is to understand, as precisely as we can, the political and social bases of institutional continuity and change in the legal systems of new states. Indonesia makes a good case example because its legal system is one of the more complicated in the world, for no reason more subtle than that Indonesia is politically and socially and in nearly every other way a very complicated country. Islamic legal institutions also make an interesting case study, because they pose the difficult problem of ideological rigidity and resistance to change.

Remarkably little has been written about Islamic courts anywhere. Despite their long history, they have usually been passed over by scholarship. It may be because they have been consistently denigrated by Islamic scholars themselves, who have tended to regard the courts as being in hopeless decline since the early

age of Islam. European-educated Muslims were and are even more contemptuous of the religious courts. There is little question but that Islamic courts, nearly everywhere they exist, do not stand out as institutions of great influence, integrity, and innovative sparkle. In any event, little research has been done on them. The major European-language work on the history of Islamic courts in the Middle East is the recent one by Emile Tyan.[1] For the rest, there is less than one would expect. There is even less on the Islamic judiciary in Indonesia: one or two brief monographs, a dissertation, and a handful of articles and references from the colonial period, the useful but short books by Professor Notosusanto published in 1953 and 1963, a few cursory mentions here and there, and perhaps a half dozen or fewer informative articles in various postrevolutionary journals.[2]

[1] Emile Tyan, *Histoire de l'Organisation Judiciaire en Pays d'Islam* (Leiden: Brill, 1960).

[2] A number of very useful general sources for the study of Indonesian Islamic legal institutions deserve immediate mention, however. In Dutch the works of C. Snouck Hurgronje, the most famous and influential of Dutch Islamologists in the late nineteenth and twentieth centuries, are available in several collected volumes and a volume of his advisory notes to the colonial government. The voluminous *Adatrechtbundels* and *Pandecten van het Adatrecht* are replete with relevant materials on Islamic law in Indonesia. The adat scholar C. van Vollenhoven's collected writings on adat law also contain commentaries on colonial policy toward Islamic law and courts. His colleague, Barend ter Haar, was less concerned with Islamic institutions, but his collected works, edited by the Indonesian adat law scholar R. Supomo, offer important insights into the views of Islam held by leading proponents of the adat law school. Th. W. Juynboll's *Handleiding tot de Kennis van de Mohammedaansche Wet,* 1st ed. (Leiden: Brill, 1903), is a prime source on Sjafi'ite doctrine as it applied in Indonesia. The dissertation by J. H. van de Velde, "De godsdienstige rechtspraak in Nederlandsche-Indie, staatsrechtelijk beschouwd" (Leiden, 1928), is one of a very few serious attempts by colonial scholars to order available data on religious courts. See also G. H. Bousquet, *Introduction à l'Etude de l'Islam Indonésien* (Paris: Paul Geuthner, 1938), and J. Prins, *Adat en Islamietische Plichtenleer in Indonesie* (The Hague and Bandung: van Hoeve, 1954). There are a number of relevant Indonesian sources on Islam and Islamic institutions, many of which can be found in the bibliographies of Prins and Benda. For background the writings of the Islamic leaders Hadji Agus Salim and Moh. Natsir, among others, are essential. The best study of colonial policy toward Islam is Harry J. Benda, *The Crescent and the Rising Sun,* part I (The Hague and Bandung: van Hoeve, 1958). Our slight understanding of Indonesian Islam, by foreigners certainly but also by Indonesian scholars, is the result of the slight amount of research that has been done on the subject. This deficiency has only just begun to be corrected. Perhaps the most important recent studies in any language

Consequently the research of this study has relied very much on personal interviews, a certain amount of documentation graciously loaned or given to me by those involved with Indonesian Islamic courts in one way or another, and observation in the courts themselves. In using interview material, I have in most cases avoided giving the names of my informants. To give them would not add much to the study, certainly not enough to risk any possible embarrassment to anyone.

Many people helped me to gather material and to understand better the problems of Islamic justice in Indonesia. I want to express my special gratitude to H. Z. A. Noeh, vice-director of the Directorate of Religious Justice, who gave generously of his time to introduce me to the world of Islamic courts. I also want to acknowledge an unpayable debt to Kijai R. H. Muhammad Adnan, a wonderfully gentle and wise and devout man, who taught me a great deal in just a few conversations.

Benedict R. O'G. Anderson and Harry J. Benda were enormously helpful in criticizing the manuscript, which incorporates nearly everything they said. Professor Benda's detailed comments, informed by his own invaluable studies in Indonesian Islamic and general political history, added whole new perspectives on a number of difficult points of analysis. Late in October 1971 Professor Benda died of a heart attack. It was an immeasurable loss.

Earlier versions of the study were usefully criticized by

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contributing to a more general comprehension of Indonesian Islam are those by Clifford Geertz, particularly *The Religion of Java* (Glencoe: Free Press, 1960), *Peddlers and Princes* (Chicago: University of Chicago Press, 1963), and *Islam Observed* (New Haven and London: Yale University Press, 1968). J. Siegel's study of Islam in Atjeh, *The Rope of God* (Berkeley and Los Angeles: University of California Press, 1969), is the first major contribution on that area since Snouck. For studies of Islamic law and legal institutions, many of the above-mentioned researches are necessary background material. Very little has been done since the colonial era on Islamic courts. The dissertation by Nancy Tanner, "Minangkabau Disputes" (Berkeley, 1971), is a significant contribution. The lack of material in Indonesian on Islamic courts is particularly striking and is most likely due to a lack of influence and interest on the part of Islamic intellectuals. The one exception is Professor Notosusanto, whose two volumes, *Peradilan Agama Islam di Djawa dan Madura* [Islamic justice in Java and Madura] (1953 ?) and *Organisasi dan Jurisprudensi Peradilan Agama di Indonesia* [Organization and jurisprudence of religious justice in Indonesia] (Jogjakarta: Jajasan Badan Penerbit Gadjah Mada, 1963), are a blessing for empirical research.

David Baker, Margo Lyon, Allan Samson, and Ted Smith, and I want to thank them.

It is all but impossible to express my indebtedness to Arlene Offenhender Lev for her many kinds of critical help and stimulation.

Responsibility for all errors in the study is of course mine, a burden I do not look forward to.

Daniel S. Lev

Introduction

LEGAL INSTITUTIONS, EVEN MORE THAN OTHER KINDS OF social institutions, cannot be understood independently of their political, social, and (in the case of Islamic courts, less so) economic roots. The proof of this proposition can be found in the vacuity of many studies of law in new states—or for that matter, old ones—that take statutory provisions and legal structures at face value, apart from the reality of their practice. Social scientists are much less prone to unrealism in studies of politics and economics, where appearances are suspect. But law seems to lend itself to being regarded as an autonomous force, possibly because we (in America at least) have tended to take law so seriously as part of our own social and political world-view.[1] "The law" and "legal system," however we have defined them, promote a sense of independent authority that inevitably lends legal institutions the appearance of more influence than they actually have. Only anthropologists, and now, increasingly, other social scientists who have become interested again in law as social institution, have avoided giving law more than its due.[2] But to go the other way, as some have, and to deny legal institu-

[1] See Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964).

[2] See Lawrence M. Friedman, "Legal Culture and Social Development," *Law and Society Review* 4, no. 1 (August 1969): 29–45.

tions any influence at all, is equally useless as a means of understanding social-legal problems. The question we have to ask ultimately is what the level of their influence is, from place to place and from time to time, and which variables determine that level of influence.

In this study legal institutions, whether secular or religious, are regarded as basically derivative from the primary institutions of political process. It is not an exclusive definition, only a useful one for examining relationships between legal systems and political systems. From different perspectives one may equally well define law as rules with sanctions, as authoritative commands, as the pronouncements of courts, as a reflection of specific kinds of values, or of culture generally, or of economic structure, or what have you. All such definitions are quite right and quite limited, as is the one used here. What law is, according to the view adopted in this study, depends upon what it is allowed to be by conditions of political power and authority, and these conditions in turn are determined by a wide variety of social, cultural, and economic forces. When the conditions change, the law must also change, sometimes explicitly but at the very least implicitly.[3]

In new states the conditions of political power and authority have changed. In some the change has been violent, in others peaceful. Yet in all of them, by definition, colonial elites have been displaced by indigenous ones who must somehow try to create an adequate base of authority and generate for themselves sufficient power to govern and to do what they want to do. The consequences of such efforts for legal institutions, in many new states, have been to render them shell-like, pristine on the outside but with indeterminate contents. In order to understand legal systems in the midst of political transformation, we must examine them from the ground up to find out what sort of political and social space is allotted to them, what kinds of functions they are permitted to serve, encouraged to serve, and forbidden to serve. Very little that is enlightening on such problems appears in statutes, needless to say, and often enough legal professionals who are caught up in the turmoil themselves have no way of explaining exactly how their roles have changed or why.

The perspective I have adopted in studying Indonesian Is-

[3] Karl Renner, *The Institutions of Private Law and Their Social Functions* (London: Routledge & Kegan Paul, 1949).

lamic courts is one that emphasizes procedure rather than substance. Not very much attention is paid the substantive rules Islamic courts apply, though an essentially descriptive discussion of them appears in the chapters on divorce and inheritance. By procedure I do not mean merely how courts work, but rather, much more widely, what kinds of courts there are, and whether and why they are deemed more appropriate than other kinds of institutions. Procedure in this sense has to do with the very sources of legitimacy and the conduct of authority.

Implicit in this concern is another closely related concern with how states are mobilized.[4] That is, what are the guiding cultural and political principles behind organization and process in the state that promote the existence of some kinds of institutions and not others? Are these guiding principles cohesive and unifying, or are they, as in Indonesia, fragmented, tending to gather around opposing symbols of legitimacy like metal particles around the poles of a magnet?

The emphasis here on continuity and change, evolution, precludes accepting simple dichotomies like that between tradition and modernity. Vague as it is, this particular set of opposites has weighed heavily in studies of law, as well as of politics and economics, and it has not helped much. Any institution likely to last is, of course, somehow rooted in tradition, and its continued existence means that it is doing something useful for somebody. Whether it is appropriate to the kinds of change that various groups may want to achieve is another question, and one that should not be dealt with too simply or unrealistically. "Traditional" political, social, religious, legal, and other institutions, as the Rudolphs have shown in a fascinating study of India, do adapt to new demands and may themselves become important instruments of change.[5] But if they do not, or do not quickly enough, it is hardly a matter merely of eliminating them, as some observers too often and too easily assume and even suggest. As in the case of Indonesian Islamic courts, which do serve useful functions in Indonesian family life and are not all that impervious to change, it is out of the question to force their abolition without the consent of powerful Islamic groups. The

[4] J. P. Nettl, *Political Mobilization* (New York: Basic Books, 1967).

[5] L. I. Rudolph and S. H. Rudolph, *The Modernity of Tradition: Political Development in India* (Chicago: University of Chicago Press, 1967).

courts may eventually disappear, possibly by a kind of fictional absorption into the civil judiciary, but only after a significant political price has been paid.

Courts are, among other things, symbols of authority, and Islamic courts are symbols of Islamic authority. This may in fact be a more important function, from the point of view of those who have power to maintain them or let them be done away with, than the judicial work the courts do. One objective of this study, therefore, is to examine the relationship of the Islamic judiciary to political and ideological conflict in Indonesia.

Another objective, however, is to look at the courts in a narrower functional way, in order to understand what they do and how, but mainly to discover the social bases of their work.

Finally, the last objective is to turn the results of the research to an explanation of the relative conservatism, in comparison with other Islamic countries, of Indonesian Islamic legal thought and practice in the wider context of Indonesian politics.

A few comments will introduce the subject of Islamic law and legal institutions in their Indonesian setting.

Although Islamic courts and legal scholarship never developed very prominently in Indonesia, compared with other Islamic countries, Islamic legal concepts contributed potential for conceiving an archipelago-wide Indonesian state, even before the Dutch actually established one in the nineteenth century. When Islam began to spread around the coastal areas of the country from about the thirteenth century onward, Indonesia consisted of a number of independently organized societies, the largest and most highly developed of which were located in Java. Culturally and politically different from one another, these societies shared no links of kinship or lasting political alliance that brought them consistently together or produced a lore of relationship from which notions of common destiny or universal authority might have emerged. Islam did not create unity out of such diversity, but it did provide some unifying principles, principles that made it possible to think in supralocal terms. The idea of *ummah*, the community of all believers, for example, related members of diverse societies to a transcendent community. So did the notion of a universal law divinely inspired. Not surprisingly, given the juridical emphasis of Islam, many concepts that the religion contributed to Indonesian societies were legal ones. In modern Indonesian, the most fundamental legal terms

come directly from Arabic. Some of them in fact have no precise equivalents in local Indonesian languages, which attests to the innovating influence of Islamic doctrine. Among them is the very word for law itself, *hukum*, which in popular usage still bears a double meaning of Islamic law or national law, either or both in contrast with local custom. In addition, *hak* (right), *adil* (just)—from which stem the terms *keadilan* (justice) and *pengadilan* (court)—*hakim* (judge), *adat* (custom), and others derive from Arabic.

Yet in a sense these words were co-opted, put to use in strange ways that did not altogether reflect concepts of Islamic justice. The reason is that Islam did not make over the societies of Indonesia, not entirely at least, nor could it have done so against the wills of the civilizations that received the new religion. People who accepted the faith did not thereby forget everything else they had inherited. Local rulers converted to Islam, but did not thereafter rule according to Islamic political principles or the Sjariah (Islamic law). If anything, with some revision older aristocratic and kinship values remained the dominant organizing principles of government. And in some cases older religious values remained dominant as well among ruling classes, a condition which they and their Islamic antagonists probably seldom forgot. Islamic institutions—the *kadi* court for one—were adopted here and there, not everywhere, but always under the aegis of mixed myths of authority in which Islam represented only one ingredient.

Bound by terms imposed by rulers who were willing to convert in name but not always a great deal more, Islamic legal institutions suffered distinct limitations. In some areas they barely existed in recognizable form. Elsewhere, as in Java, Islamic courts were established, though of a hybrid sort that applied mixed rules from Islamic law and local custom. Still, although Islamic courts and administration never became as important symbolically to most Indonesian rulers as to those of the Middle East, they probably were not unimportant either for Indonesian Muslims. Had they been utterly useless, they most likely would not have existed at all. Islamic law was never taken over fully anywhere in Indonesia, as indeed it was never applied fully anywhere in the Islamic world. Mainly its influence was over family affairs, matrimony and to some extent inheritance, and even here Indonesian societies picked and chose among rules that were

then adapted to suit their own organizational values and needs. No doubt it is true that many devout Muslims obeyed the law as fully as they knew it, purely out of devotion and religious obligation. But if the present-day situation is any indication, as it must be, generally Islamic rules had a better chance of being adopted when they were convenient and appropriate and threatened no conservative social interests.

From one point of view, a political one, whether institutions and rules are doctrinally true is irrelevant, as long as they are called by the proper name of the authority they invoke or evoke. Indonesian Muslims were evidently no less Muslims for having ignored or hybridized religious rules whose historical origins were far away in quite different cultures. The eclectic absorption of Islamic legal institutions by rulers who were often only nominally Muslim undoubtedly served the purpose of keeping the loyalty of many Muslim subjects. Their mixed quality, moreover, probably reflected accurately the highly mixed quality of religious life in most Indonesian societies, based on a more or less harmonious continuum of religious influences that somehow blended with one another into a comprehensible whole and caused little social upset, as long as people did not suddenly regard their piece of the continuum as exclusively genuine. But the existence of institutions called Islamic, and therefore at least partly Islamic, contained an implicit threat of a call to a more purely Islamic authority. Religious conflict in Indonesia, as in all societies whose leadership draws on religious sources of authority, almost always takes the form of political conflict as well. When this happened, as it did from time to time in the Islamic history of Indonesia, the hybrid Islamic legal institutions were caught up in a painful tug of war between contending principles of authority and, more concretely, antagonistic political groups.

Such contention continues in modern Indonesia, where the place of Islam is perhaps the most serious political problem in the evolution of the state. Its seriousness lies not merely in the drain of social and political resources caused by ideological strife over proper rulership of the state, but also in the long-lastingness of the deep division and in the particularly brutal kind of conflict that religious-political cleavage usually promises.

The aspect of the problem with which this study is concerned, the evolution of the Indonesian Islamic judiciary, is relatively quiet and unknown. In its quietness, however, it seems

to reflect fairly accurately the kinds of social, political, and ideological arrangements that have been made in the course of ongoing conflict in Indonesia. Islamic courts do not attract much attention, because few people consider them a central issue of political contention, though in a grand sense they are. Yet they have gone through and are going through a process of change similar to that of other institutions bearing symbolic weight in the political system.

A Note on Style

Throughout I have used Indonesian transliteration of Islamic legal terms rather than Arabic. For those who are used to the Arabic, however, the differences are not great and the terms are recognizable. These terms are not always spelled consistently in Indonesian, and here and there in the text inconsistencies may appear. But where this is the case, the different spellings are obvious—for example, *ummah* and *ummat*.

Personal names are sometimes spelled variously, and I have used whatever spellings authors have preferred for different books and at different times.

At the end of each excerpt from my interview notes and case reports (in the text and in the footnotes), I have indicated the place and date of the interview in parentheses.

CHAPTER ONE

Colonial Policy and Influence on the Evolution of the Islamic Judiciary

No detailed historical analysis of Islamic legal institutions will be undertaken here, though one needs doing.[1] For our purposes a brief sketch of the evolving position of Islamic courts until the end of the colonial period will be sufficient. What will be emphasized is less the formal legal changes that took place than the major issues that set them off, the ideological conflicts they caused, and the institutional effects that accrued.

The political and social context within which Islamic institutions existed was not wholly favorable to Islam, as was indicated in the Introduction. Political authority, while superficially converted, stood essentially hostile to and often even fearful of Islamic pressures. From the time when Islam first began to spread through the archipelago, a tension, sometimes blurry and sub-

[1] See especially C. Snouck Hurgronje, "Rapport van Dr. Snouck Hurgronje over de Mohammedaansche Godsdienstige Rechtspraak, met name op Java," Feb. 24, 1890, in *Adatrechtbundels I* (The Hague: Martinus Nijhoff, 1911); Th. W. Juynboll, *Handleiding tot de Kennis van de Mohammedaansche Wet* (Leiden, 1903); and J. H. van de Velde, *De godsdienstige rechtspraak in Nederlandsch-Indie, staatsrechtelijk beschouwd* (Leiden, 1928).

dued, sometimes clear and fierce, arose between claims to explicitly Islamic rulership and the reality of implicitly non-Islamic and religiously syncretic rulership. This tension remains today. It pervades the societies of Indonesia, is always potential even when religious and political conflict is not particularly obvious. What has been and is at stake is not simply political authority, however. Political and cultural conflict have gone together. While many political leaders and their followings have often feared Islam, they have also disdained it. Historically, this deep tension has been articulated largely in terms of the struggle between Islamic law and pre-Islamic custom, adat. Almost inevitably, Dutch colonial authority became involved in the struggle.

Until the late nineteenth century the predominant Dutch view of Indonesian law was that it was basically Islamic. This was not an exclusive conception. Many Dutch scholars and observers shared the understanding of the Englishmen Raffles, Marsden, and Crawfurd of the complex intermixture of different religious and social norms and values in the societies of the archipelago.[2] The distinction between Islam and adat was well

[2] See C. van Vollenhoven, *De Ontdekking van het Adatrecht,* (Leiden: Brill, 1928), and R. Supomo and R. Djokosutono, with the assistance of Mrs. Ch. Pieters-Gill, *Sedjarah Politik Hukum Adat* [The history of adat law policy] (Djakarta: Djambatan, 1954), particularly vol. II on the period 1848–1928, pp. 79ff., on the confusion of views of adat and Islam by the mid-nineteenth century, when major new basic codes were beginning to appear. The two-volume work by Supomo and Djokosutono, largely written during the Japanese occupation, is the best existing review of colonial policy toward adat law. It relies heavily on van Vollenhoven and similarly inclined scholars. Raffles' seminal work, *The History of Java,* 2 vols. (London: John Murray, 1830), contains numerous profound insights which had to be discovered again in later decades. Of the influence of Islam, toward which he shared some of the biases of later European ethnographers, he wrote, "Some difficulty appears to have occurred in adapting these institutions [which the Malayan nations had developed before the coming of Islam] to the general tenor of the Mahometan law, and many anomalous ones appear accordingly to have sprung up in different states. These occur in every part of jurisprudence, whether commercial, civil, or criminal. . . . They vary considerably from each other in different states, and still more from the generally acknowledged principle of Mahometan law, as received by the Arabs. Hence there is, in almost every state, a constant struggle between the adherents of the old Malayan usages and the *Hajis,* together with other religious persons, who are desirous of introducing the laws of the Arabs, in order to increase their own importance. . . . [The] mixture of religion and tribes has tended, in some degree, to soften the intolerance of the Mahometan system among the Malayan nations, and neither the posi-

known and was usually mentioned in general terms by government statements of legislative policy. And the colonial view of Indonesian law and society was in no way predicated on admiration for Islam. In the struggle between Islam and adat everywhere in Indonesia, the Dutch inevitably took the side of local "adat"—that is, the essentially pre- and sometimes anti-Islamic local social authority—against the universalist claims of Islamic leaders. The usual and most obvious example is the Sumatran Padri War during the first half of the nineteenth century. Nevertheless, at a time when few colonial officials were deeply concerned for the welfare and attitudes of their wards, other than those likely to promote the conditions necessary for economic profit, they were more inclined than not to take Islamic appearances at face value.

The existence of Islamic courts promoted these appearances. But their condition varied widely throughout the archipelago.[3] In some places—Atjeh and Djambi in Sumatra, South and East Kalimantan, South Sulawesi, and elsewhere—religious judges were appointed directly by local rulers. In other areas, including parts of North Sulawesi, the North Sumatran territories of Gajo, Alas, and Tapanuli, and South Sumatra, there were no distinct religious courts, though local religious leaders performed judicial services. In Java, which is the main concern of this part of our discussion, religious courts existed in all *kabupaten* from about the sixteenth century. (The *kabupaten*, headed by a *bupati*, was the major administrative district in Java. Having undergone a long history of change, *kabupaten* remain the basic territorial administrative unit in Java, where there are more than eighty of them, and the other islands have also been divided up into *kabupaten*. In modern Indonesia *kabupaten* are organized under provinces. Each *kabupaten* is made up of subdistricts, *ketjamatan*—an intermediary unit, the *kewedanaan*, having been abolished in the 1960s—below which are the villages.) They were run by penghulus, chief administrators of the local mosques, who held judicial sessions in the mosque *surambi* (fore-

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tive authority of Islam, nor the persuasions of their Arab teachers, have hitherto been able to induce them to abandon entirely their own peculiar usages and customs" (I, 261).

[3] For a reasonably full picture of the organization and competence of Islamic courts everywhere in the archipelago, seen van de Velde, *De godsdienstige rechtspraak in Nederlandsch-Indie.*

court), from which these courts took their name. No other formal courts served the Javanese population. From the 1830s Islamic courts in Java were subordinated to the colonial *landraden*, which alone could issue orders to execute contested decisions (*executoire verklaring*). Nor could religious courts try claims for money or goods. They were nevertheless *the* courts for Javanese in matters of personal law. (Family law was in any case evidently the main concern of the Islamic courts, as elsewhere. This was advantageous for Dutch interests as well. Thus the law of land was assumed to be based on Javanese adat law, customary law, which it was in fact, and this offered the great benefit of the notion that all land legally belonged to the king.) The Dutch made no attempt to interfere with the organization of Islamic courts in Java and Sunda (West Java) until the 1880s, at a time, as the famous Islamic scholar and colonial adviser C. Snouck Hurgronje later indicated in a devastating criticism, when colonial authorities still were inadequately informed about Indonesian Islam.

Throughout Indonesia during this period Islamic officialdom, including the courts, shared a fundamental lack of social independence and institutional autonomy. This is not meant in the sense of a lack of separation of functions. In Islamic legal doctrine, and even more in practice, Islamic courts enjoyed no independence from executive power anywhere. But in Indonesia this meant distinct subordination to an authority which devout Muslims did not commonly regard as devoutly Muslim. Links to relatively independent Islamic social forces were evidently very few. Islamic officials were not integrally related to the independent Javanese *kijai* (ulamas) whose considerable followings possessed great political potential under an Islamic banner, nor did they have much to do with the growing commercially oriented coastal Islamic groups from which new political leaders and intellectuals emerged in the late nineteenth and twentieth centuries to embrace the ideas of Islamic reform promoted by 'Abduh and al-Afghani.[4] They were undoubtedly influenced by

[4] See Harry J. Benda, *The Crescent and the Rising Sun* (The Hague and Bandung: van Hoeve, 1958), pp. 9–32, and Clifford Geertz, *Islam Observed* (New Haven and London: Yale University Press, 1968), particularly pp. 65–70 on the "scripturalist interlude." Geertz points out, with typical incisiveness, that the term *reform* does not really serve well to describe ideological change in Islam during the late nineteenth and twentieth centuries. Rather the return to the early, pure, unadulterated

both social-ideological streams, but they were not in the forefront of either. As a group, Islamic officials were not involved in any of the Muslim rebellions of the nineteenth century, either against adat leaders or against the Dutch. If anything, at least in Java, they were more often than not on the side of "traditional" authority, uninterested in opposing the colonial regime so long as their own functions, perquisites, and symbols of authority were not threatened.[5] The penghulu, chief mosque administrator, who also, in addition to other duties, presided over the Islamic court, was essentially an appointee of the royal or local aristocratic authority. Indeed, the latter might often select someone from his own family for the job. Religious officials had no obvious spiritual power or authority, which might have lent them slightly more independence, for Islam harbors no conception of priestly office. As Snouck argued in his criticism of the royal decree of 1882, for the *bupati* (regents) as well as for village heads, Islamic officials were understood not as spiritual leaders but as *beambten* (officials) with what amounted to a fairly unspecialized but distinctly subordinate kind of responsibility.[6] Nor were Islamic officials well educated or trained in Islamic law, a

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ideas of the Koran remained largely that, while the "modernist" or modernizing thrust was short-circuited by a continuing emphasis on the all-sufficient teachings of the Prophet. Nevertheless, as Geertz also indicates, by the beginning of this century a religious-political movement had emerged from the Islamic search for meaning in the modern era, ending the accommodation (not always peaceful) between Islam and pre-Islam of earlier centuries. However, it should be added, as something of a qualifier to Geertz's brilliant sweeps of historical analysis, that as Islam in Indonesia (and elsewhere) was socially differentiated, so the response of Islamic groups to the new scripturalist ideas differed in place and time. The traditional Islamic bureaucracy, for example, was slower than the Islamic urban middle class to sympathize with the modernist movement. Some Islamic intellectuals who were educated in Western schools, in Indonesia as in India and elsewhere, did in fact begin to reach beyond the limits of scripturalism. See also Geertz, *Religion of Java* (Glencoe: Free Press, 1960), for a discussion of the "modern" and "traditional" strains in Javanese Islam.

[5] W. F. Wertheim, *Indonesian Society in Transition*, 2nd rev. ed. (The Hague and Bandung: van Hoeve, 1959), p. 203. This accommodation of the Islamic bureaucracy with both traditional Indonesian authority and colonial authority has continued in the independent state. The ability of the Nahdatul Ulama, the party of inland Javanese Islam and also of the Islamic bureaucracy, to work comfortably with the government of President Soekarno, while the modernist Masjumi was abolished in 1960, can be understood as a similar accommodation.

[6] *Adatrechtbundels I*, p. 210.

kind of expertise that might also have lent them a measure of independence.

It was largely for these reasons that the Islamic judiciary in Java, as in other Islamic countries, did not attract support from the Islamic modernist movement. Both *prijaji*—the aristocratic, bureaucratic Javanese gentry—from a generalized antagonism to Islam, and Muslim intellectual leaders felt contempt for the low-grade Islamic judges, whose condition was hardly improved by the reorganization of 1882. But Islamic leaders of the new urban, intellectual, and "modernist" breed must also have felt their utter lack of control over the Islamic bureaucracy, such as it was. Nearly everywhere the penghulu and other Islamic officials remained under the control of local government officials, who (other than Dutch officials) in Java were *prijaji* and elsewhere customary authorities with little interest in promoting Islam independent of their own influence. In Java the local *bupati* appointed the penghulu and the *wali* (ritual guardian of the bride) for the Islamic marriage ceremony. For a time, the Department of Internal Affairs supervised penghulu in their judicial capacities, both in the Islamic courts and as advisers in the *landraden.* Since Islamic officials were thus subordinate to local authorities, whether traditional or colonial but in any case basically non-Islamic, they were obviously not fully amenable to appeals from a new and more dynamic political Islam. On issues of overwhelming symbolic import for Islam, intellectual leaders and the Islamic officials might come together, but otherwise the relationship was sporadic and weak.

Nevertheless, the reorganization of Islamic courts in 1882, though ineffective in terms of its own immediate goals, began to set in motion some significant changes.

This reorganization established essentially new religious courts alongside the *landraden,* on which they depended for executory authority, with the same *kabupaten*-wide jurisdiction.[7] The new courts were called *priesterraden* (priests' courts) on the mistaken assumption that the penghulu and their subordinates functioned as priests; Snouck hammered so hard on this hopeless misconception of Islamic religious and social structure that his attack is still automatically mentioned by scholars who write about the history of the courts. In popular parlance

[7] Royal Decree of Jan. 19, 1882, no. 24, S. 82–152.

the courts became the *raad agama* (religious court), a term still heard now and then in Java, and even *landraad agama* and other variations. The new courts were collegial, consisting of a penghulu as chairman and from three to eight members. This innovation was also based on a misunderstanding, but it stuck, with some modification, despite Snouck's ridicule, which present-day scholars nevertheless also never fail to repeat.[8] As before, the jurisdiction of the *raad agama* included matrimonial issues and inheritance.

Having created these courts and given them a measure of formal independence from Javanese political authority, the government then stopped short. On the principle of no interference with religion, the colonial administration did not provide for educating religious judges or for paying them. The inevitable result was that corruption, in the sense of fee extraction from which there was no legal recourse, not only continued but may have increased. By the early decades of the twentieth century, religious courts were deeply vulnerable to the charge of venality, which among other things made them even more contemptible in the eyes of Islamic intellectuals.

Perhaps the most significant effect of the reorganization, however, was precisely to loosen the bonds between Islamic officials and their *prijaji* overlords. The chairman of the *raad*

[8] The Islamic *kadi* was traditionally a single judge, as he was in Java. But as the penghulu might often ask the advice of others in judicial sessions, it appeared as if the court had multiple members. In addition, no doubt, collegiality appealed to the European legal mind. As Snouck pointed out, however, the members appointed to the Islamic courts were actually administrative subordinates of the penghulu and so, of course, would be unlikely to exercise any independence of judgment. The common practice of Javanese courts, before the several judicial changes worked by the colonial government, including that of 1882, understandably confused outsiders. Thus the penghulu had actually served in two distinct judicial capacities. In one he was head of the *surambi* court, which was the "Islamized" version of the traditional royal *pradoto* court, with jurisdiction over a wide variety of matters to which Islamic law did not apply; most of this jurisdiction, including criminal law for example, was removed piecemeal to colonial government courts during the nineteenth century. In the second capacity the penghulu heard matrimonial and inheritance disputes as an Islamic judge applying, presumably, the Sjariah rules. But in both functions the penghulu evidently presided in the *surambi*. See Snouck Hurgronje, *Rapport*, esp. pp. 206–212; Juynboll, *Handleiding*, pp. 323–327; and R. Tresna, *Peradilan di Indonesia dari Abad ke Abad* [The judiciary in Indonesia from century to century] (Djakarta: Versluys, 1957), pp. 92ff., largely based on Snouck's writings.

agama, who also served as Islamic adviser to the *landraad*, was now appointed by the Dutch resident or, in the four princely states of Surakarta and Jogjakarta, by the governor. It was this that most disturbed Snouck Hurgronje, who as Adviser for Native Affairs (from 1889) had done more than anyone else to clarify the picture of Indonesian Islam, yet could not win acceptance for his policy views.[9] These views were predicated on the supposition that Islam would continue to expand in Indonesia, that its universality would increasingly supplant the particularism of adat. Stemming any potential Islamic "fanaticism" would depend upon the ability of the Dutch to moderate Islamic ideals with Dutch culture. In this Snouck was much closer to the French idea of a *mission civilisatrice* than any other Dutch colonial leader.[10] The class through which Dutch culture was most likely to filter, however, was the aristocracy. Encouraging the independence of Islamic officials from the aristocracy was unfortunate, for, among other reasons, it would make less likely a moderate evolution of Indonesian Islamic doctrine within the context of a local authoritative structure that itself would be increasingly amenable to European influence. The failure of the colonial government to improve Islamic education or to assure the integrity of Islamic courts by paying their judges made matters worse.

The independence of the *raad agama* from local Javanese authority, which to Dutch legal minds was required by the principle of separation of powers, did not soon go far in reality.[11] The relationship between local Islamic officials and the *bupati* families remained too close to permit a sharp break. Nor were local Dutch officials, particularly the residents, likely to encourage greater independence for Islamic officials from *prijaji*

[9] See Benda's enlightening discussion of Snouck, in *Crescent*, pp. 20ff. and passim.

[10] Ibid.; and Snouck Hurgronje, *Nederland en de Islam* (Leiden: Brill, 1911), pp. 78ff. G. H. Bousquet, *A French View of the Netherlands Indies*, tr. from the French by Philip Lilienthal (New York: Institute of Pacific Relations, 1940), pp. 108ff., said of Snouck that he was the only Dutch colonial leader whose views were sympathetic to French colonial policies with respect to the "civilizing mission."

[11] Benda, *Crescent*, pp. 83–86, and Snouck, *Rapport*, passim. It should be emphasized that in more general terms the "independence" of the Islamic courts remained severely restricted. Within the judicial system, as before the reorganization, they had to rely for execution upon the authority of the *landraden*.

social and political influence. Yet the reorganization of 1882 laid a basis for greater autonomy of Islamic courts and, equally important, for a more supralocal orientation by Islamic officials. The critical underpinnings of these institutional developments were two gradual and uneven structural changes: a growing specialization of Islamic judicial work, and the imposition of a "national"—that is, from the colonial administrative center of Batavia (Djakarta)—supervisory jurisdiction. Taken alone these changes might not have overcome the inertia of local social realities. In the context of a burgeoning Islamic political movement, however, and the emergence of a sharper confrontation between Islam and adat in colonial policy, they began to bear institutional fruit.

Benda has dealt with the differences between Snouck and the adat law scholars, particularly van Vollenhoven and ter Haar, who dominated the legal-policy scene in the twentieth century. Little can be added to his analysis here, but a few points deserve emphasis. If one looks outward from Indonesian experience rather than inward from the perspective of colonial policy, the various Dutch views were lined up on one or another side of a very long Indonesian social conflict. In their own way, the Dutch were merely additional weapons in this conflict, to be wielded with more or less facility by Indonesian contestants. It is harder to place Snouck in this picture than van Vollenhoven, ter Haar, and their colleagues, because Snouck was rather more distant and detached.[12] Moreover, Islam had few dedicated sympathizers among Europeans, men who would cheer for an Islamic

[12] Van Vollenhoven's biographer contrasts the respect which Indonesian students in Leiden, where both Snouck and van Vollenhoven taught, had for the former with the respect and warmth which they felt for the latter. Henriette L. T. de Beaufort, *Cornelis van Vollenhoven: 1874–1933* (Haarlem: Tjeenk Willink, 1955), pp. 190–191. While van Vollenhoven and ter Haar are remembered with great affection, and even as allies, by many Indonesian lawyers and legal scholars of adat sympathies, the same can hardly be said of Snouck in the eyes of Islamic leaders. Nevertheless, it was Snouck, I think, whose wider vision encompassed an eventually independent Indonesia beset by problems which the colonial regime should have begun to deal with. The adat law scholars, many of whom, like van Vollenhoven and ter Haar, were sympathetic to the liberal *de Stuw* group in the colony, were perhaps emotionally more caught up in Indonesia. But though the logic of their views, as Bousquet noted, led to independence for Indonesia, apparently they could not conceive of a real Indonesian state with real political and social problems.

victory over adat. Islam was too universal in its appeals, too threatening in European memories, and potentially too powerful; Islam was altogether unquaint. Nevertheless, as Snouck came to adat from Islam, adat law scholars came much less so to Islam from adat. They stood on different ground, by and large, probably knew different Indonesians, and therefore saw Indonesian historical necessity in different lights. While for Snouck the most careful attention must be paid to the development of Islam—in which view history seems to have proved him right—the adat law scholars, like many ethnologists and anthropologists, were interested in securing and preserving the purity of what they understood as tradition.[13] As scholars (in contrast with colonial administrators) they may have been influenced by the ideas of the continental historical school of jurisprudence. Law was thus seen as the natural outgrowth of natural community, and "unnatural" alien accretions and influences should be avoided as much as possible. In the Indonesian case this meant not only Dutch but also Islamic accretions, a view enthusiastically encouraged by *prijaji* administrators and students.

The next major issue in the development of the *raad agama* has to be interpreted in this light. Snouck's criticisms of the reorganization of 1882 had had some influence in official circles. But more important, the adat law scholars were successfully battling efforts either to codify adat law or to impose European codes on all population groups, and they were about to take on more delicate problems. In 1922 the colonial government created a commission to look again into the question of the *priesterraden.*

[13] In all the European colonies, whatever the philosophical approach to the colonial mission, powerful tendencies usually emerged within the colonial administrations to protect, conserve, and even to restore traditional law. Cf. R. Maunier, *The Sociology of Colonies,* 2 vols. (London: Routledge & Kegan Paul, 1949), II, 487ff. Often this was for the sake of political convenience, or because it soon became apparent that old law would not easily change in favor of new colonial law. But in addition, a point which Maunier does not seem to recognize, the preservation of tradition and the often futile efforts to revive it once dead, usually occurred in the context of a struggle by the colonial authority against some competing universal appeal—frequently Islam. Islamic protests, as in the *dahir* of Morocco in 1930 (see Maunier, II, 489) which sought to restore traditional Berber law among groups already converted to Islam, were not simply against the reversion to old law but obviously against what was clearly an anti-Islamic move. The particularism of locally or tribally oriented traditional law—seen especially in terms of its symbolic value—had obvious advantages for the maintenance of colonial rule.

It was not, as Benda points out, a commission likely to delight Islamic groups.[14] This commission adopted some of Snouck's proposals. The incorrectly labeled *priesterraad* was now named *penghulu-gerecht* (penghulu court). It would consist of the penghulu as judge, assisted by not more than two assessors and a clerk.[15] Judicial and clerical staff, moreover, would be paid

[14] Benda, *Crescent*, p. 224, n. 71. The chairman of the commission was R. A. Dr. Hoesein Djajadiningrat, an "Adjunct Adviser for Internal Affairs" and Indonesia's foremost Islamic scholar, who was the first Indonesian professor in the Rechtshoogeschool, the colonial law faculty established in 1924. He was also from a leading West Javanese aristocratic family and not altogether trusted in Islamic political circles because of his rather close association with the government. The other members were two *bupatis*, R. A. A. Soewondo of Pati, and R. A. A. Tjakraningrat of Bangkalan; three Islamic figures, H. Moh. Dahlan, chairman of the "modernist" social and educational foundation Muhammadijah in Jogjakarta, R. H. Moehamad Isa, Chief Penghulu of Serang, and H. Aboe Ngamar, Penghulu of Purbolinggo in the Banjumas area of Central Java; and finally ter Haar, then chairman of the *landraden* in Purbolinggo and Purwokerto, adviser in the Department of Justice, and professor extraordinary in the Rechtshoogeschool. Dahlan and Aboe Ngamar were soon replaced on the commission by H. Hadikoesoemo, also from the Muhammadijah, and M. H. Ichsan, penghulu of the *landraad* in Temanggung. See *Commissie van Advies nopens de voorgenomen herziening van de Priesterraad-Rechtspraak*, report submitted to the Governor General on April 28, 1926. The representatives of Islam, particularly the penghulus, were at something of a disadvantage on the commission, partly perhaps because the proceedings were in Dutch and—though this is not clear—they would therefore have had to have translators. An additional report submitted by H. Hadikoesoemo was originally written in Indonesian, though possibly for nationalist reasons, and then translated into Dutch. But in addition the status differences on the commission worked powerfully against the Islamic participants, who might have been reluctant to speak out in opposition to the views of the high *prijaji* members and ter Haar. In July 1940, the leadership of the newly formed Perhimpoenan Pengoeloe dan Pegawainja (PPDP: Association of Penghulus and their Staff) met with the Adviser for Internal Affairs, Dr. Pijper, to discuss the law on religious courts, which had finally gone into effect in 1937. Pijper pointed out that after all there were penghulus on the Commission of 1922. A PPDP leader, M. A. Mahfoeld, replied: "With respect to the Commission, yes, although there were two Penghulus on the Commission, I still want to ask what power they had in the face of a highly educated man who was also of very high rank, in fact dozens of times higher than the rank of a *landraad* penghulu? The one I mean is *padoeka* ['excellency'] Prof. ter Haar, who was exactly a champion of Adat Law, and who was a member of the Commission. . . ." Stenographic report of the meeting, in the journal of the *Diwan Rasmi P.P.D.P.* (Official Council of the PPDP) no. 4, Oct.–Dec. 1940, p. 100. I am grateful to Kijai R. H. Mohammad Adnan of Jogjakarta, a PPDP leader who attended the meeting with Pijper, for giving me this copy of the journal.

[15] Although the commission report was the basis of new legislation

regular salaries, which it was supposed would eliminate the often exorbitant extraction of fees from which religious-court employees made their living. In addition, a major innovation proposed by Snouck almost three decades earlier, an Islamic appeals court (Mahkamah Islam Tinggi: Hof voor Islamietische Zaken) would be established for all of Java and Madura.

For Muslim leaders, however, the core of the commission recommendations and the legislation that followed had to do with the substantive jurisdiction of religious courts. In effect the commission proposed to remove all Islamic court competence over property affairs to the *landraden.* This included *wakaf*—religious foundations, usually in the form of land—and, most critically, inheritance. By comparison with the problem of inheritance, all other issues were relatively minor. Defenders of the reform later argued that the main objection of the religious courts to the removal of their inheritance jurisdiction was an economic one. Inheritance cases brought in considerable fees to the courts, which religious judges and their staffs were undoubtedly loath to give up. But this was only part of an explanation of the fury which the reform aroused among Muslims. A great deal more was involved that went deeper into the heart of the issue. While reorganization of the courts could be sustained without fundamental challenge to the Faith, the elimination of the inheritance jurisdiction was an explicit denial of ground which Islam was presumed (by Muslim leaders) to have already won. It was, indeed, a denial that Islam had made very much headway at all in Indonesia, a view which the adat law scholars by now took for granted. Or to put it another way, from the perspective of Islam, the new law was a reversion to the pagan past, and aroused the same kind of Islamic protests that occurred in North Africa and the Middle East when the French regime in Morocco tried to revive tribal law in areas that Muslim leaders believed were already converted to Islam.[16]

The moving force behind this change was ter Haar and the

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in 1931, there are a number of differences between the report and the new law. Where this is the case I have chosen to refer to provisions of the regulation of Jan. 31, 1931, S. 31–53, which went into effect after some changes with S. 37–116.

[16] Maunier, *Sociology* (n. 13 above). One naturally wonders whether the Islamic turmoil in Africa over the *dahir* issue beginning in 1930 had any repercussions in Indonesia at this time. It is possible, and research in Indonesian sources for the 1930s may turn up evidence of it.

adat law students who had begun to gather around him in Java and van Vollenhoven in Leiden. Most of these students were fairly highborn Javanese *prijaji.* The most famous of them, one who would influence legal policy through the Japanese occupation and the revolution, was the late Professor R. Supomo (d. 1958). Picking up momentum in the struggle to preserve adat law, ter Haar, Supomo, and the others argued forcefully that Islam had not in fact deeply influenced the inheritance rules of the family in Java or, by extension, elsewhere in Indonesia. They insisted that the Sjariah law of inheritance, having originated in Arab lands, was little related to the sense of justice of Indonesian societies. Thus while the character of Islamic inheritance law was individualistic, adat law was communally oriented. According to Islamic law, heritable property was valued as a whole, while in adat law distinctions were made between different categories of property. And so on. A good deal of evidence illustrated these disparities. For example, as ter Haar and his colleagues pointed out, the *faraid'l* (inheritance) rules of Islam exclude adoptive children from an inheritance portion, but this is certainly not the case in Java. Islamic law also prohibits substitution of heirs—that is, the child of a predeceased parent does not inherit the parent's portion—which in Java is considered improper and unjust. Moreover, the adat supporters claimed, too absolutely, in ethnic Java (Central and East Java) men and women divide property evenly, while Islamic inheritance rules give men two portions to one for women. Therefore, as the Islamic rules of inheritance had not been fully "received" into adat law, the jurisdiction of Islamic courts was inappropriate and should give way to that of the *landraden,* which would determine and apply the proper adat.[17]

[17] For a rather full exposition of the pro-adat view and some of the data used to support it, see B. ter Haar, "Adaterfrecht op Java," *Verzamelde Geschriften,* II, 519–556, an expanded version of a paper read before a meeting of lawyers in Batavia on June 2, 1938. Ter Haar was on the defensive in this piece, denying that the regulation of 1931 was in any way inspired by lack of goodwill toward Islam. (See p. 521.) During the Japanese occupation, in 1944, Prof. Supomo wrote a paper on the religious courts for the occupation administration which is also most useful in assessing pro-adat views. Supomo, "The Sooryo Hooin and the Inheritance Law" (in English), dated June 23, 1944. In it he mentions that ter Haar objected to a proposal made in the Commission of 1922 that the *landraden* should try inheritance cases according to the Islamic law, on grounds that Islamic law was in no way part of the Indonesian sense of justice. The *landraden,* in his view, must use the adat law. Only if an Islamic rule had become adat would the *landraden*

The regulation of 1931, which largely followed the commission recommendations, was not implemented until 1937, partly because the government lacked funds during the depression years, but also, perhaps, because of some concern over Islamic reactions.[18] When the new law did go into effect, shortage of money required the postponement of the reorganization of religious courts themselves and the payment of salaries to the judges. These provisions were adopted later and have been maintained since the revolution. What happened in 1937, then, was that an Islamic Appeals Court was created in Batavia, and the *landraden* assumed competence over inheritance disputes. (*Wakaf* issues seldom came to court anyway.) Islamic officials had remained rather quiet about the whole issue of religious courts until this time. It is probably true that not many of them were really aware of the implications of the law, which had not been overly publicized. Moreover, they were in a weak position, for the religious courts had long been under attack because of the corruption and low quality of their judges. But soon after the law was implemented, a case arose in the Bandung *landraad* in which an inheritance was awarded to an adopted son, bypassing the nephews and nieces of the deceased.[19] This offered an opportune issue for a few institutionally conscious and coura-

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apply it, and then as adat, not as Islamic law. This formula was accepted by the government.

[18] The decision to implement the law was evidently taken after consideration by a government-created committee of eight members. If the information I have is correct, the committee divided four to four, which may have inclined the government to be wary of implementation or at least to be very quiet about it. Much of my discussion of these developments is based on an interview of Oct. 24, 1960, in Jogjakarta with the PPDP leader, Kijai R. H. Moh. Adnan, who was active in the protest against the new law. One member of the committee which discussed execution of the law was Husein Djajadiningrat, who evidently favored putting the regulation into effect. Kijai Adnan indicated that he himself did not know about the decision to implement until the events recounted in the text took place.

[19] As recounted by Kijai Adnan, this case involved a jockey (or handler) who was the adopted son, and an inheritance consisting of a horse. Without having the decision before me, it might be speculated that the judge was as much interested in equitable considerations as in the formal rules of inheritance. In any event, the decision obviously went against the Islamic legal view that an adopted child cannot inherit and that agnatic kin cannot be displaced by non-kin. Other *landraad* decisions in inheritance cases at this time were also used by the Islamic judges to attack the effects of the new law.

geous Islamic judges, who convened a meeting in Solo of penghulus and other religious court personnel to discuss the Bandung case and related matters. The meeting produced a new organization of penghulus and their staffs, the Perhimpoenan Pengoeloe dan Pegawainja (PPDP).[20] Nothing of the sort had existed before, and in an important sense it resulted from the reorganization of 1882. Not only was the organization Java wide; it also represented a break by the penghulus from local political control. It was a significant step toward autonomy, one encouraged also by a heightened sense of conflict between Islam and its opposition since the 1910s. This is not to say that the leadership of political Islam and the Islamic bureaucracy began to merge, but at least they now met on an issue of common concern to Indonesian Islam. The evident political activity of religious officials in the courts encouraged modernist political leaders like Moh. Natsir to believe for a time that Islam was resurgent and on the move.[21]

Two general kinds of arguments were raised against implementation of the new law. While the PPDP took an almost technical view of the disadvantages of adat inheritance rules, Islamic political leaders stressed wider issues of the place of Islam

[20] According to Kijai Adnan, who called the first meeting in Solo, it was not at first intended to establish a new organization, but some of those present felt that nothing could be accomplished by sporadic protests. In effect, an organized pressure group was needed. A second meeting was held in Bandung, a third in Pemekasan, and a fourth again in Solo, all to take up the question of religious court powers. At first some religious judges from Sumatra and Sulawesi were present in the discussions in Java, but it was decided that the PPDP should include only Islamic officials from Java and Madura. Among other reasons for this, the religious courts outside of Java were not affected by the regulation of 1931, and even now they share jurisdiction over inheritance with the secular courts. In addition, however, the decision to exclude Islamic judges from the other islands probably reflected something of a limited political imagination on the part of PPDP leaders. Another PPDP leader, Hadji Djunaedi of Tanggerang, indicated in an interview (Nov. 2, 1960) that actually the PPDP, though organized on the initiative of the penghulus, was used by the government as a means of containing the penghulus' potential as an oppositional force. Thus, H. Djunaedi said, while the PPDP could criticize government policy on a few matters, it did not really attack Dutch rule itself. This view reflects a wider political orientation, which most of the Islamic bureaucracy in Java did not share.

[21] See, for example, Moh. Natsir, "Kedudukan Ulama dalam Masjarakat" [The position of ulamas in society], originally published in *Pandji Masjarakat*, June 1939, in his *Capita Selecta*, 2 vols., compiled by D. P. Sati Alimin (Bandung: Sumur Bandung, 1961), I, 133–139.

in Indonesia. The PPDP insisted not only that many *landraad* inheritance decisions went against Islamic law, but also that the attempt to find and apply the adat law of inheritance led to untenable oddities. Some comments in a discussion held on July 22, 1940, between the PPDP leaders and Dr. G. F. Pijper, Adviser for Native Affairs, are worth reporting verbatim. At one point Pijper asked how the new law would hurt Islam. Kijai Adnan replied.[22]

> ADNAN: First, applying the Adat law in inheritance cases of the Islamic Indonesian people is damaging to the holy principles of succession in Islamic family life. In the Adat law even an illegitimate child can become an heir . . . ; even a child who has left Islam (*murtad*) can inherit from his father, mother, or siblings who remain devoted to Islam, with the result that Islamic family life could be stained.
>
> Second, according to the Word of the blessed Prophet, the *faraidhl* [inheritance rules] are among those legal rules which are the religion of Muslims, so that if a Muslim cannot follow them it means the practice of his religion has been restricted. . . .
>
> PIJPER: Oh, pardon, but the Government does not forbid Muslims from following the *faraidhl* rules. . . . For example, men concerned in such cases can request a *fatwa* [advisory opinion] from an Islamic Ulama if they want, and the Government will not forbid it or interfere.
>
> M. A. MAHFOELD: (PPDP): Thank you for that very important information, but that is not what the PPDP has to consider. Because even before as now, and likely in the future, asking Ulamas for *fatwa* [can always be done]. Doing things that way is of course very good for those who want to compromise . . . but for those who do not want to compromise and need a decision from a court which formally uses Islamic law, there is no place for them now. This is what the PPDP is worried about.
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> ADNAN: . . . Third, in practice it is clear that in inheritance cases Adat law cannot give the same legal certainty as Islam. We can take examples to prove this like these: In a country [*negeri*] like Solo for example, there might be *landraad*

[22] See *Diwan Rasmi P.P.D.P.* (n. 14 above), pp. 100–104. Pijper, one of Snouck's successors, appears to have been rather sympathetic to the PPDP views, but his influence was considerably less than Snouck's had been. Indeed, by this time, the adat law scholars were rather fully in control of the situation.

sessions in three places. . . . Now each of the *landraad* sessions would be considering an inheritance case. Even though the three cases are similar, the decisions are different from one another. This never happened when inheritance cases were tried according to the *faraidhl* rules of Islam.

There was a case in the Solo *landraad* which on appeal [to the Third (adat) Chamber of the *Raad van Justitie* in Batavia] was decided according to the Adat law . . . of Blambangan, an ancient country [of Java, of which there is almost no modern trace anymore].

PIJPER: . . . Ach, how could there be such an odd decision, Mr. Chief Penghulu? [23]

ADNAN: [Adnan went on to discuss this and similar cases, the proper sources for which are cited in the report of the discussion.] The Adat law compiled now, it can be said, is merely the product of certain men whose basic views can also be said to be: as long as it is different from the *faraidhl* of Islam. . . . [Thus, in the Solo case in which the appeals court applied the Adat Blambangan, . . .] Why not use an Adat that is more famous and more clear? For example, the Adat of the Demak, Mataram, and Surakarta Kratons. As for Blambangan, its traces now can hardly be seen.[24]

The PPDP's efforts were in vain, and the new law remained in force despite protests from Islamic groups.[25] It is worth looking at the adat-Islam issue in broader terms, however, for what it can tell us about the character of this conflict as it relates to the position of Islamic institutions, particularly the courts.

The arguments of the adat law scholars were no more nor less "true" than those who supported the case of Islamic law. But to the extent that they pretended to be free of anti-Islamic bias and ulterior political motives they were false, albeit often unconsciously. In addition, they missed the point of the social

[23] The decision was rendered on May 26, 1939, according to the report of the discussion in the *Diwan Rasmi P.P.D.P.* See also similar decisions from the Purworedjo (Central Java) *landraad* in *148 Tijdschrift v. h. Recht* (1938), also cited by Adnan.

[24] Blambangan was a Hinduized kingdom of East Java at the time of the fourteenth-century empire of Madjapahit. The rise of Demak, Mataram, and Surakarta all came when the influence of Islam in Java was already strong. Hence the modern significance of the ancient contrast.

[25] An attempt by the colonial government to reform the Islamic law of marriage, mainly with respect to polygamy, aroused even greater protest by Islamic groups and was defeated. See Benda, *Crescent,* p. 89.

issue behind the technical legal question. Ter Haar's data were usually no doubt correct, though occasionally exaggerated.[26] Islam had not radically altered Indonesian social organization everywhere, and therefore the patterns of its substantive legal norms were not always followed in practice. Indonesia hardly represents an unusual case in the history of Islamic law. Even the family-law rules of the Sjariah have seldom been accepted fully anywhere in the Islamic world. But to jump from this to the proposition that *existing* Islamic institutions had not been received by Indonesian societies is untenable, for the fact is that they had been, in the various forms and qualities which a process of adaptation had forced upon them. To the extent that people believed that the rules applied by Islamic courts were unjust, as in any society, they probably avoided them, as many later avoided the *landraad* and its successor in the independent state, the *pengadilan negeri*, if they could. But what was really at issue was less the justice of given rules, which people still find ways to get around more or less comfortably, than the political legitimacy of given institutions. As nearly as anyone can tell, the functions of religious courts were accepted as legitimate, and they still are. When the question of legitimacy was raised at all, it was usually related to broader issues of ideological conflict, not to

[26] It is generally true, for example, that the Islamic rules concerning substitution of heirs and the inheritance rights of adoptive children are not *commonly* followed in Java. But whether the division of property between males and females follows a two-to-one or a one-to-one rule was and remains in question. The Supreme Court of independent Indonesia has ruled in favor of the one-to-one division. See Daniel S. Lev, "The Supreme Court and Adat Inheritance Law in Indonesia," *American Journal of Comparative Law* 11 (1962/2):205–224. In common practice one finds considerable variation in the division of property, and men will as often argue the justice of a two-to-one share as a fifty-fifty share. In his book *Adat Law in Indonesia* (New York: Institute of Pacific Relations, 1948), p. 207, ter Haar indicates that the two-to-one rule is often followed in the division of community property. One difficulty with the interpretation of such data as the prewar adat law scholars collected is that when it came down to deciding which rule a community followed, the process of determination was almost statistical but without the benefit of a full sample. But many of these points are minor, except insofar as the adat law scholars used them to support arguments whose ramifications went beyond the "legal" proposition, and I do not mean to contend that the Islamic law was more widely received than Vollenhoven, ter Haar, and others were willing to admit. I am contending, however, that although they had a very broad and enlightened view of law in society, they had a much narrower understanding of law as social and political process in total societies.

the functions that the courts performed. So far as the inheritance problem of the 1930s is concerned, there is no evidence to indicate that the *landraden* were any more legitimate than the Islamic courts, or that they were in fact capable of applying law that was more indigenous, so to speak, than were Islamic courts.[27] Apart from the point that many Javanese Muslims did more or less accept Islamic rules out of religious obligation—as in any society some rules are accepted merely because the "system" is legitimate—it is equally important that the *landraden* were more foreign to Javanese culture than the Islamic courts. The reasoning behind the shift in jurisdiction over inheritance affairs was, after all, that the *landraden* would apply adat law though the Islamic courts did not. This was to compare a real situation with an ideal one. Many *landraad* judges, the vast majority of whom were Dutch, did not know the adat well, and there was a natural tendency for European conceptions of equity to enter their decisions.[28] Moreover, the procedure of the *landraden* was alien to village Indonesia, at least, and the adat law consists as much in procedure—for example, conciliation—as in substantive rules, perhaps considerably more.

There is no question but that the *adatrechtpolitiek* had a great deal of support among the Javanese *prijaji* elite and among comparable aristocratic groups everywhere in the Netherlands Indies. As political life in the colony broke out into a rash of

[27] Ter Haar admitted as much in his constant emphasis upon the need for European judges to learn about local adat law. He was certainly aware that a court, to reflect legal values faithfully, must be part of the community. It was partly this realization no doubt that led to the attempt to revive traditional adat courts outside of Java and even in the Javanese *kratons*. But in Java generally the *landraad* had to serve the purpose, as it did in other directly governed areas of the archipelago.

[28] In Indonesia, as in other European colonies, the concept maintained that local law should not be upheld if contrary to general principles of equity and justice in civilized nations, a guiding norm helpful only in extreme cases—torture, mutilation, and so on—but otherwise a pragmatic concession to the values of foreigners with power to prevent some of their values from being violated. Quite apart from cases under this rubric, however, the European judge was constantly involved in judicial situations where his own values might have and undoubtedly did have play. Ter Haar understood this problem, but his solution for it was to call upon government judges to make themselves fully aware of the values of the communities whose disputes they decided, a praiseworthy but generally impossible idea. See, for example, ter Haar, "De Betekenis van de tegenstelling participerend-kritische denken en de rechtspraak naar Adatrecht," *Verzamelde Geschriften,* II, 586–605.

political organizations that divided along lines of social-religious cleavage, this support grew stronger. Adat law in Indonesia, as in other Islamic countries, tends to be defined precisely in contrast to Islamic law, *hukum;* it is originally an Arabic word that refers to local custom. This contrast has political and cultural as well as legal significance. It may well be that while Dutch scholars were slightly more concerned with the legal significance, Indonesian leaders were much more impressed by the political and cultural significance. But it is more likely that European biases against Islam, combined with a sense of European interest in weakening the political potential of Islam as a unifying force, easily found common cause with domestic elites who were forever hostile to Islam and fearful of its expansion.[29]

It is in this perspective on law not merely as rules but as major symbolic systems, reflecting both social values and the ultimate sources of legitimacy, that the intensity of the Islamic reaction to the law of 1931 has to be understood. For Islamic groups the implementation of the law was a major victory for anti-Islamic forces—both the Javanese *prijaji* class and the colonial European Christians. Along with other legislation relating to Islamic institutions, it was not only an unacceptable intrusion into Islamic affairs but also a threat to continued Islamic growth. As Muslim leaders (along with Snouck, years earlier) saw it, the perpetual struggle between Islam and local adat must eventuate gradually but increasingly in an Islamic victory.[30] A kind of

[29] These domestic elites were nevertheless differently oriented from the European scholars, who had less of a stake in the society conceived politically and socially. It is for this reason that, while European scholars still frequently make pleas for the preservation of and respect for customary law in former colonies, many indigenous scholars, who once fought hard for the sanctity of tradition against the incursions of both Islam and European culture, turn away from tradition toward modern codes, usually ineffective, once the colonial period has ended. In Indonesia Prof. Supomo followed this pattern, though other adat law scholars, like Prof. Djojodigoeno of Gadjah Mada University, have retained a powerful adat law bias throughout.

[30] See Moh. Natsir, "Pertjaturan Adat dan Agama" [The contest (literally, chess game) between adat and religion], originally published in *Pandji Masjarakat,* June–July 1939, in *Capita Selecta,* I, 139–152, where Natsir cites Snouck approvingly to the effect that not only Islam but other influences must eventually change the matriliny of the West Sumatran Minangkabau. During the 1930s Minangkabau received a great deal of attention from Islamic writers because it represented the clearest and most extreme case of conflict between adat and Islam. This article by Natsir was in response to a motion by the PERTI (Persatuan Tarbijah

dialectic was in process, which Islamic leaders believed must be encouraged, not impeded; the *adatrechtpolitiek* not only was an impediment, it set the clock back. What was involved was more than a matter of distinct legal rules, whether of inheritance or anything else. Rather it affected the whole—and for Islamic leaders, changing—structure of legitimate authority. From this point of view, the aim of colonial adat law policy after the 1910s was to freeze the process, to stop it in its tracks, in order to preserve ancient tradition and, where it had atrophied, even to restore it against a liberating expansion of Islam.[31] For all their weaknesses, the Islamic courts were one symbol of Islamic authority, which the adat law scholars and their aristocratic allies would have abolished were it possible.[32] And the inheritance rules, along with the rest of family law which Islam has everywhere held to be the essential core of the religion's legal concern, were symbolic of the extent of Islamic growth.[33]

The basically reactionary *adatrechtpolitiek* was indeed an intrusion upon an ongoing process of political and social change. Whatever the ideals of its formulators, an essential aim of the policy was to push Islam back, to hem it in, and almost romantically to maintain the purity of traditional societies whose traditions could only isolate them from one another. As many Indonesian leaders have supposed, the *adatrechtpolitiek* fed into a broader divide-and-rule approach to colonial administration. For

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Islamijah), a Minangkabau Islamic organization, which called upon Minangkabaus to use the inheritance rules of the Sjariah.

[31] The late Hadji Agus Salim, a major leader of modernist Islam, in a comment on a resolution concerning adat and Islam by the PSII (Partai Sarekat Islam Indonesia) in 1934, noted: "To be frank, the government policy [concerning adat law] supports the conservative forces with all its law and apparatus of authority." He went on to argue that the forces of change no longer accept the old order, but that the colonial government was stemming this change by reinforcing the reactionary leaders whose symbol of authority, in effect, was adat. See his collected writings, *Djedjak Langkah Hadji A. Salim* (Djakarta: Tintamas, 1954), pp. 188–189.

[32] One of the first questions taken up by the Commission of 1922 was whether the Islamic courts should continue to exist at all, a question also raised rather frequently in the independent state by non-Islamically oriented groups. See *Commissie van Advies*, report, p. 2 (n. 14 above). To try to do away with the courts, however, was recognized as a very rash move.

[33] Snouck had advised that the Islamic family law, including inheritance, must *not* be challenged. See Snouck, *Nederland en de Islam*, pp. 59–60.

most people in village and urban Indonesia, it probably did not make that much difference. As will be seen in a later chapter, many continued to use the Islamic courts in their inheritance affairs. Politically, however, Islam had sustained a loss, one which it did not have the power thereafter to recoup.

Yet it was not only the strength of traditional authority, in alliance with colonial power or not, that held Islam politically at bay, but also new social and political trends essentially oriented neither to adat nor to Islam, important as these remain symbolically. The internal difficulty for Islam was (and is) that it offered an inadequate alternative to adat. Partly under pressure from ideological conflict, Islamic leaders were unable to provide a more open choice to those who were in fact spinning off from older adat bonds. As Geertz has pointed out, the return to the original purity of the scriptures in the "reformist" movement stopped there, without taking a step forward in the search for new religious meanings in the modern world.[34] The writings of Islamic intellectuals during the 1930s illustrate this problem, for then as now many were aware of the confining influence of traditional Islamic thought. This is all the more true of Islamic law, bound as it is to the Holy Koran and the interpretations and innovations of, at the latest, tenth-century Islamic scholars. Islamic institutions, and particularly the Islamic bureaucracy, were themselves molded in an ancient cast that Islamic political and intellectual leaders had to support without being able to effect change or exercise control.

In the meantime, however, these institutions had in fact undergone significant change largely as a result of colonial policy and often independently of the new Islamic political movement, whose leaders, at least among the modernist group, frequently disdained them. The trend toward growing, though still limited, autonomy of the Islamic judiciary has been mentioned. Some of the innovations introduced in Java were extended to the other islands. The *kadi* courts of Kalimantan, for example, were reorganized and appeals instances were created there. Had there been time, similar changes probably would have been imposed elsewhere outside of Java. In Java itself, religious officials regarded the new Mahkamah Islam Tinggi suspiciously as a pay-off to Islam for the loss of control over in-

[34] *Islam Observed.*

heritance, and their interpretation may have a great deal of merit. Being hostile to a government-inspired innovation with respect to Islam, and fearing perhaps that the colonial government would try to control religious courts through the Mahkamah Islam Tinggi, Islamic judges wanted to create their own appeals instance.[35] But at length the Mahkamah Islam Tinggi was accepted, though with misgivings.

The changes that had occurred in the Islamic judiciary remained after colonial history had ended, and the trend they represented continued under the same pressures and restrictions. But the political context changed, with significant consequences.

[35] Interview with Kijai Adnan, Oct. 24, 1960. Until 1942, when the Japanese occupation began, final appeal from the Mahkamah Islam Tinggi was to the Governor General, who relied on Islamic advisers in such cases. The first chairman of the new appeals court, Moh. Isa, was related to Husein Djajadiningrat, whom, it has been indicated, many religious officials distrusted for his *prijaji* origins and his association with the colonial government. This undoubtedly reinforced the apprehension of Islamic judges that the government would try to manipulate the religious courts. The first clerk of the Mahkamah Islam Tinggi was Notosusanto (now Prof. Notosusanto), who had completed his studies in the Rechtshoogeschool. His appointment may have been primarily intended to lend some administrative expertise to the new appeals court, but it is quite possible too that the government officials responsible for his appointment hoped to introduce some secular legal influence as well. On the early organization of the Islamic Appeals Court, see Notosusanto, *Organisasi dan Jurisprudensi Peradilan Agama di Indonesia* (Jogjakarta: Jajasan Badan Penerbit Gadjah Mada, 1963), pp. 10–11. Kijai Adnan became chairman of the Mahkamah Islam Tinggi sometime during the Japanese occupation and remained in this position until 1951.

CHAPTER TWO

Islamic Mobilization and Institutional Consolidation

The next step in the evolution of the Islamic judiciary occurred late in the Japanese occupation (1942–1945) and the revolution (1945–1949). It had little to do with religious courts themselves. They remained in operation more or less as before, and this chapter will barely mention them. It had to do, rather, with the mobilization in the new state of political forces committed to defending and promoting Islamic institutions on a national scale. This was essential to the survival of Islamic courts, let alone the development of other Islamic administrative institutions. Without mobilization of Islamic power, the courts might have been done away with quickly and happily in independent Indonesia. At least they would have remained frozen in their colonial condition, subordinated to the confining authority of national and local civil bureaucracies. As it happened, they achieved an existence relatively autonomous from the civil bureaucracy, though subordinated within a growing religious bureaucracy.

During these critical years of constitutional origins, in the broadest sense, essential compromises were made which began to give form to fundamental notions of can and cannot in the Indonesian state, notions which have remained rather much in

force ever since. It was a period of what might be called the founding mobilization, by which I mean, following Deutsch and particularly Nettl, that people were induced to choose up sides and symbols with the sort of deep and vigorous commitment that made change possible and likely.[1]

This mobilization was not by Islam alone. Nowhere have Islamic symbols completely dominated periods of accelerated political change in this century. But in Indonesia, Islamic groups had to bargain with other centers of power, which were recognized historically as non- and frequently anti-Islamic, even though they had superficially espoused Islam without fundamentally relinquishing pre-Islamic values. These other groups, represented in the party system by the Nationalists (PNI), Communists (PKI), and a variety of smaller organizations, were able consistently to maintain the political and social upper hand, despite anxiety over pressure by organized Islam.

Islamic mobilization was part of a grander nationalist revolutionary mobilization, which in some cases benefited Islamic claims and in others constrained and limited them. Older local institutions collapsed before the enormous attraction of new national revolutionary symbols. Throughout the country traditional authorities were challenged or destroyed, occasionally with brutal violence, as in the "social revolutions" of Atjeh and East Sumatra in 1945 and 1946. To replace them, men called up symbols of revolution and Indonesian nationhood. At this time local adat courts began to be wiped out, often by local initiative, and demands went up for the establishment of new national courts. National leaders of the revolutionary republic in Jogjakarta were eager to accede to these demands and encouraged them.[2] Those who dominated the republic and manned the (for our study) critical Ministries of Interior and Justice were European-educated nationalists, committed to the rapid establishment of national, "modern," and secular institutions in the new state. For them—particularly urban intellectuals, lawyers, and other professionals among them—independence had to be accom-

[1] Karl Deutsch, *Nationalism and Social Communication* (New York: M.I.T. Technology Press and John Wiley and Sons, 1953), and Peter Nettl, *Political Mobilization* (New York: Basic Books, 1967), esp. pp. 32–33.

[2] The revolutionary elimination or weakening of local adat courts, consequent upon challenges to traditional local authority, will be dealt with at length in a later study of Indonesian legal change.

panied by a kind of modernization which, if it meant anything, required obliteration of particularistic, religious, non-state-dominated political institutions out of Indonesia's past. Given any opportunity at all, they would have eliminated Islamic legal institutions along with those of local adat tradition. But for Islamic groups, revolutionary symbols were often also Islamic symbols, and the fall of adat institutions provided an opportunity for the further expansion of Islamic authority.

Muslim groups were as always at a disadvantage in this struggle. Local Islamic demands succeeded here and there in establishing religious courts outside of Java. They even raised claims to a fuller implementation of the Sjariah. But Islam had no permanent national institutional base from which to pursue its goals and consolidate its gains, unlike the state bureaucracy largely controlled by non-Islamically inclined Javanese *prijaji* and their allies. The Ministry of Religion created during the revolution filled this gap. This chapter will deal with the emergence of the Ministry of Religion and related developments that affected the institutional environment of Islamic courts.

JAPANESE OCCUPATION AND THE ISLAMIC SEARCH FOR ADVANTAGE

The occupation led to a strengthened Islamic position in judicial affairs in one or two areas outside of Java. In Atjeh the Japanese military administration permitted ulamas to become judges as a sop to Atjehnese Islamic groups.[3] By and large, however, no remarkable improvement took place in the condition of Islamic institutions during the occupation. Except for the creation of the Islamic umbrella organization Masjumi, on whose basis a party of the same name was built early in the revolution, Islam did not fare much better under the Japanese than under the Dutch. Anderson has argued persuasively that the Japanese,

[3] See A. J. Piekaar, *Atjeh en de Oorlog met Japan* (The Hague and Bandung: van Hoeve, 1949). Many of these men were ulama in name only—they were often called ulama Djepang (Japanese ulamas)—whose appointments resulted from support by the major Atjehnese Islamic organization PUSA (Persatuan Ulama Seluruh Atjeh). They were appointed to new magistrate courts created by the occupation administration. No Islamic courts existed in the area until the early months of the revolution, when they sprang up on local initiative. Ironically, "ulamas" on the civil courts became defenders of these instances against the jurisdictional expansionism of new Islamic courts.

like the Dutch, eventually realized how much they needed dominant aristocracies in order to administer Indonesia.[4] Inevitably this worked against Islamic interests.

Nevertheless, Islamic leaders saw a chance in the occupation to regain what had been lost during the 1920s and 1930s, perhaps more, and pressed the Japanese military administration to restore the rights of the Islamic *ummah*. *Prijaji*-nationalist leaders, of whom Soekarno was chief figure, parried this pressure at nearly every turn.[5]

[4] Benedict R. O'G. Anderson, "Japan: 'The Light of Asia,'" in J. Silverstein, ed., *Southeast Asia in World War II: Four Essays* (Monograph Series No. 7, Southeast Asia Studies, Yale University, 1966).

[5] In the political biography of Soekarno by Bernard Dahm, *Soekarno and the Struggle for Indonesian Independence* (New York and London: Cornell University Press, 1969, translated from the German by Mary F. Sommers Heidhues), Dahm argues that competition between nationalist and Islamic groups was really not so evident, and was in fact subordinated to their common commitment to independence. The materials I have examined on legal institutions during this period do not support Dahm's analysis. On the contrary, as Benda and Anderson have argued, conflict between these historical antagonists continued unabated. Both made every attempt to use the Japanese as they had the Dutch, and if the Japanese seemed more amenable to Islamic pressure than the Dutch had been, nevertheless it was the nationalist group that had the advantage in both periods.

Abikusno Tjokrosujuso, a strong-willed and astute Islamic political leader, who played an active part in the events of the 1930s and the occupation, took this view of occupation policies: "Dutch policy rendered Islam weak. Islam had no well-trained religious officials in the mosques or Islamic courts. And also Islamic leadership was not of top quality. The Dutch undertook a policy of undercutting and weakening Islam. When the Japanese came, they realized that Islam was a force in Indonesia that could be used. Of course every government which wants to be effective [especially, Abikusno implied, one that is foreign and has specific ends in mind] must find and attract those interests that are large and powerful and have theretofore been dissatisfied. The Japanese realized Islam was such an interest group and determined to use it." But at this point in the interview Abikusno began to present a picture of occupation policy that was something less than one committed to favoring Islam. He pointed out that the Japanese had few experts on Islam, and they were frequently confused by Islamic groups and their demands. When I asked why the Japanese administration did not grant Islamic groups many of their demands, particularly with respect to Islamic courts and other legal institutions, Abikusno replied that the occupation government "was primarily interested in keeping things calm and manageable . . . and in addition had a similar interest in the continuing production of war material. Therefore they were not apt to take any measures that might threaten the calm they wanted in the country, especially in such affairs as religious courts and the like." (December 11, 1960.)

In June 1944 Professor Supomo, the famous adat law scholar who now advised the occupation government on legal matters, submitted a report on the Sooryo Hooin (Islamic courts) and inheritance law.[6] Islamic leaders had raised this question with the administration, which evidently sought background material and advice from Supomo. In his report Supomo carefully discussed the history of religious courts in Indonesia, particularly Java. Worried, perhaps, that the Japanese might accede to Islamic wishes, he as painstakingly developed a case against restoring any competence over inheritance to the Islamic judiciary. At least, Supomo argued, because the problem was so complex, any decision should be put off until Indonesia became an independent state. Nothing was done.

This was not the end of the matter. Apparently Supomo wrote his paper on inheritance in response to Islamic pressure on the Japanese. During late 1944 and 1945, as the probability of independence became clearer, this pressure grew. The first major debate in an official body between Islamic and nationalist leaders over the character of the future Indonesian state took place, not in the constitutional discussions of mid-1945, but secretly during the months of February through April 1945 in the Sanyo Kaigi (Advisers Council). The Sanyo Kaigi, which Anderson has described as an embryonic cabinet, was created in late 1944.[7] Consisting primarily of senior Indonesian advisers to administrative departments in the occupation government, it met in secret sessions (or on occasion its members sent their comments individually) to consider problems on which the Japanese wanted advice. Its members included Abikusno Tjokrosujoso, Buntaran Martoatmodjo, Ki Hadjar Dewantara, Moh. Hatta, Rasjid, Samsi, R. M. Sartono, Singgih, Soekardjo, Soewandi, Supomo, and Woerjaningrat—all of whom responded to administration queries about Islam. A majority of these men were nationalist political leaders who had little sympathy with, in fact felt threatened by, Islamic demands. The most outspoken Islamic figure among them was the PSII (Partai Sarekat Islam Indonesia) leader, Abikusno.[8]

[6] This report was found among the Supomo papers, most of which were left in the Ministry of Justice after Professor Supomo's death in 1958. I am grateful to officials of the ministry for permitting me to examine them.

[7] Anderson, "Japan: 'The Light of Asia,' " p. 37, n. 28.

[8] In the late thirties Abikusno, an architect and contractor in pri-

On January 30, 1945, a few questions were addressed to the Sanyo Kaigi concerning Islamic issues.[9] On the surface these questions seemed innocuous—Should Friday be the national day of rest? and What should be done about the position of penghulu, the mosque treasury, Islamic courts?—but they were important enough to have the Sanyo Kaigi try to deal with them. Professor Supomo, who took active part in the ensuing discussions, was probably in close contact with the administration about these problems. Very likely it was his influence on the phrasing of the questions that put Islam on the defensive from the start: the directive asked whether the Sooryo Hooin (Islamic court) should perhaps be abolished.[10] During the first two weeks of February Supomo and Abikusno composed their views on the functions of the penghulu and related problems, while A. Wachid Hasjim, a Nahdatul Ulama (NU) leader, also submitted a brief note, possibly at Abikusno's behest. In a scholarly review of the legal position of the penghulu and religious courts, Supomo gave priority to such questions as whether the penghulu should continue to serve as adviser to the first instance civil court and as adviser to the *bupati*, whether existing Islamic courts should be retained, and whether in the future Indonesian state Islamic

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vate life, was head of MIAI (Madjlisul Islamil a'laa Indonesia), a federation of Islamic groups. He was also secretary of the consultative organization of all Indonesian political parties in the colony, the Gabungan Partai Politik. Something of a maverick, he did not fully represent any of the major strains of Islamic doctrinal thought, though his thinking was in general modernist-fundamentalist. He was particularly influential during the early years of the occupation, but remained significant throughout. He was also a member of the Chuo Sangiin (Central Advisory Council) during the occupation. See Harry J. Benda, *The Crescent and the Rising Sun* (The Hague and Bandung: van Hoeve, 1958), esp. pp. 112–114.

[9] Documents on the Sanyo Kaigi discussions were found among the Supomo papers. The letter transmitting the questions was unsigned, but presumably came from the Gunseikanbu (Military Administration Headquarters).

[10] In documents of later date written by Supomo, the suggestion appears again. But it is mentioned at this early stage by no one else until a more general discussion of the subject. Supomo did not actually vote in the Sanyo Kaigi discussions, and I may be wrong in assuming he was a member. He did submit several notes on the Islamic issues, however, and there is little question but that he was a leading antagonist of Islamic views. Other nationalist members of the Sanyo Kaigi appear to have relied upon his expertise in these issues. There were other lawyers on the council, including Sartono, Soekardjo, and Soewandi.

courts should exist at all.[11] For Supomo and other nationalists, a secular state had the double blessing of being modern and disadvantageous to Islam. Failing the elimination of religious courts, however, it is noteworthy that Supomo was willing to settle for eliminating the penghulu's functions in all civil institutions. It may be that to his mind this would have at once modernized civil courts and local administration while restricting the potential influence of Islam. At the same time, however, the inevitable result would be to lift *prijaji* influence over Islamic officials. As it happened, this is the way things eventually worked out.

Abikusno, as one would expect, took an altogether different view of the matter. He too reviewed the historical and legal evolution of mosque organization, religious courts, marriage law, and so on during the colonial period, but with Islamic passion and dismay at the treatment of Islamic institutions by the Dutch.[12] Abikusno insisted not only that Islamic courts must remain—he took this for granted—but also that they should be strengthened through the provision of better-educated and government-paid judges. And of course competence over inheritance should be restored to Islamic courts. Plying the route of Islamic fundamentalism, Abikusno bore no brief for existing penghulus and ulamas, but he argued forcefully for granting the Islamic *ummah* its full due, which amounted to something very close to an "Islamic state."

On February 16 and 17 the Sanyo Kaigi met to discuss these issues. Its members decided to draft four questions on which they would vote. The predominantly *prijaji* makeup of the council, and Supomo's influence at this point on the problem of Islam, is reflected again in the phrasing of the questions. The first item

[11] Document dated Feb. 10, 1945, marked "secret" and from the Sanyo Kaigi. Several other problems listed by Supomo are worth mentioning. These were, *inter alia,* whether the functions of the penghulu as mosque head and judge should not be separated (as they were after the revolution), whether the penghulu should remain an adviser to the *bupati* for religious affairs, or whether the *bupati* should remain responsible at all for religious affairs, whether (if the Islamic courts remained in existence) the Islamic judge should be paid by the government and according to what standards. In addition Supomo asked how the quality of penghulus could be improved and, significantly, how the relationship between penghulus and ulamas (*kijai*) might be improved.

[12] Five-page single-spaced document dated Feb. 15, 1954. Supomo papers.

was possibly included to give Islam an indubitable victory on something. The questions and votes were as follows:

(1) Is it necessary to have chief mosque administrators (*kepala mesdjid*)?

(2) Is it necessary to have Islamic religious advisers for *bupatis*, as regional executives?

(3) Is it necessary to have Islamic advisers in first instance civil courts (Tihoo Hooin)?

(4) Is it necessary to have Islamic judges in addition to secular courts (*pengadilan kedoenjaan*)?

Member	(1)	(2)	(3)	(4)
Abikusno	yes	yes	no	yes
Soekardjo	yes	no	no	no
Samsi	yes	yes	no	no
Woerjaningrat	yes	yes	no	yes
Soewandi	yes	yes	no	yes
Hatta	yes	yes	no	yes
Singgih	yes	no	no	no
K. H. Dewantara	yes	yes	no	no
Buntaran	yes	yes	yes	no
Rasjid	yes	yes	no	yes
Sartono	yes	yes	no	yes

A last question was added to number four, concerning what powers Islamic courts should have. Only Abikusno and Rasjid sought restoration of competence in inheritance and *wakaf* issues, while the rest insisted on the jurisdictional status quo, if there were to be Islamic courts at all.[13]

Several members of the Sanyo Kaigi—Woerjaningrat, Soewandi, Hatta, Sartono—were moderate or conservative men, unwilling to push ideological arguments to extremes and eager to work out compromises. Moreover, secrecy in Sanyo Kaigi meetings encouraged compromises. Even so, great tension arose over these issues of Islamic administration, because they reflected on grander issues of religious and political conflict in the long past and in any future Indonesian state.[14] Had it been up to the

[13] Three-page report summarizing results of Feb. 16–17 meetings, including commentaries on the issues by Supomo and Abikusno. Supomo papers.

[14] A majority of the Sanyo Kaigi members who participated in these discussions did not want to limit their import to the immediate period, but insisted that the council should begin to lay the bases of the

Sanyo Kaigi, the Islamic judiciary would have barely squeaked through. If anything, this probably indicated to Muslim leaders that mass power outside the government would be necessary to achieve Islamic goals.

By the February 17 meeting of the Sanyo Kaigi, Soekarno, as chief political adviser to the occupation government, had sent word to Sartono that penghulu problems could be left for future determination. The Gunseikanbu (Military Administration Headquarters) wanted the Sanyo Kaigi's views on the principles of relationship between state and religion in independent Indonesia.[15] This promptly set the stage for an even clearer ideological polarization. Abikusno's passionate defense of Islam now was matched by arguments from Hatta and Sartono for a "religiously neutral" state. In fact, Sartono changed his mind about continuing the Islamic judiciary. "In the new State," he wrote, "which will separate affairs of State from affairs of Religion, it is unnecessary to establish a special court to try those affairs of Muslims closely connected with their Religion. It is sufficient for all cases to be tried by an ordinary court, which can ask the advice of a religious expert." [16] Hatta, future vice-president, ignored problems of religious administration in favor of a carefully reasoned and sympathetic argument, directed to Muslims, for keeping affairs of state and religion separate.[17] A devout Muslim from West Sumatra, educated in Rotterdam, and bound by neither traditionalist nor fundamentalist doctrine, Hatta asked

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future Indonesian state. Sartono, Woerjaningrat, and Abikusno demurred, the first two probably because they wanted to avoid a major conflict, Abikusno also because he knew his views would be overwhelmed. Ibid.

[15] Ibid. Abikusno, Hatta, and Supomo were asked by the Sanyo Kaigi to prepare comments on this more general issue. The council requested more time to consider the matter, at least until the end of March. It was evidently granted, though the papers asked for were finally dated April.

[16] Two-page document dated April 14, 1945. Sartono, a founding leader of the Nationalist party (PNI) and later Speaker of Parliament in the new state, was by this time essentially concerned to limit the influence of Islamic administration and to assure the ascendancy of civil state influence in the lives of citizens. Thus while he proposed that mosque affairs should be handled by the Islamic community, since state and religious affairs would be separate, yet because the state was responsible for public safety and welfare, appointments of *imams*, managers of mosque funds, and so on should be reported to the government.

[17] Four-page document, undated but probably written sometime in March or early April. Supomo papers.

whether it is really possible to base national law purely on the Koran. This was the crux of the issue of "Islamic statehood."

> A healthy sense of logic tells us it is not possible. . . . The Qur'an is especially the basis of religion, not a book of law (*kitab hukum*). The various legal needs of today find no regulations in the Qur'an. . . . If all these legal needs must be filled from the Qur'an through interpretation, how difficult government will be; and how many men are capable of doing it? Of course the Qur'an establishes a basis for justice and welfare, which must be followed by Muslims. But this basis . . . is only a guiding goal. . . . The people of the state themselves must establish orderly law by their mutual deliberations. Of course every person will express his conceptions based on his religious convictions. But the resulting law will be *state* law, not religious law. Possibly it will be state law much influenced by religious law or its spirit may be infused with religious spirit. . . . We will not establish a state with a separation of religion and state, but a separation of religious affairs and state affairs. If religious affairs are also handled by the state, then the religion will become state equipment and . . . its eternal character will disappear. State affairs belong to all of us. The affairs of Islam are exclusively the affairs of the Islamic *ummah* and Islamic society.

The arguments were essentially the same as those in Egypt and Pakistan, among other Islamic countries. Hatta wanted a deconfessionalized state, neither encumbered by nor encumbering religious administration, though infused perhaps by a religious spirit. But he could not convince committed political Muslims. For Islamic leaders, whose claim to leadership rested on Islamic appeals, this kind of reasoning was simply not acceptable. The essential thrust of Islamic ideology was precisely that state and religion, state affairs and religious affairs, *ought* to be one. Looking back on this period, Abikusno (in an interview, Dec. 11, 1960) said that the Islamic community was then solid in its desires and that it was absolutely necessary for the place of Islam to be raised to the greatest possible heights. For himself, he said, there could be no separation between the private and public law of Islam. He and those many who agreed with him felt (and feel) that Islam could survive and grow stronger and be fulfilled as a religion only if it had the state behind it. This was what

the Dutch had denied to Islam: the state which could bring the religion to fulfillment.[18]

Nothing came immediately of the Sanyo Kaigi discussions, which were continued in expanded form in the Preparatory Committee for Indonesian Independence. Islam had won little more from the Japanese on these issues than from the Dutch.

REVOLUTION AND THE ISLAMIC SEARCH FOR CONCESSIONS

The situation changed just before the declaration of independence and during the revolution. Now nationalists of Islamic and non-Islamic political orientation confronted one another without benefit of an alien power-holder as buffer. What had been a largely administrative condition became a primarily political one. Non-Islamically oriented political leadership, dominated by the middle and lower reaches of the Javanese *prijaji* aristocracy, was in control. But Islam represented too much political power, a good deal of it organized, to be ignored. Islamic groups, with decades of frustration behind them, once again sought political-religious fulfillment in the independent state.

From June through August 1945, as Indonesian leaders prepared for independence by drafting a constitution and dealing with attendant problems, Islamic groups were again disappointed in a major symbolic battle.[19] In the committee (BPKI) estab-

[18] In the Sanyo Kaigi, Abikusno proposed a rather thoroughgoing reorganization of Islamic administration and political organization, which will not be described here because nothing at all came of it. But in his statement to the council, recalling MIAI protests against Dutch policy in the late 1930s, he appealed to the Japanese to grant the requests of Islamic groups: "If the respect of the [Japanese] government towards the religion which is the soul of the people can materialize in some clear proof, there will be no end to the respect and help of the Ummat Islam to the Military Government, even more than before." Three-page document on religious affairs by Abikusno, no date, but probably written in March or early April. Supomo papers.

[19] The constitutional discussions took place in two committees created by the Japanese to consider problems of independence. The first was the Badan Penjelidikan Kemerdekaan Indonesia (BPKI: Investigatory Committee for Indonesian Independence), succeeded by the Panitia Persiapan Kemerdekaan Indonesia (Preparatory Committee for Indonesian Independence). See the stenographic reports in Moh. Yamin, *Naskah Persiapan Undang-Undang Dasar 1945* [Documents on the preparation of the constitution of 1945] (Djakarta: Jajasan Prapantja, 1959),

lished by the Japanese to discuss a constitution, Islamic leaders demanded provisions that would place the state unequivocally behind Islam. Most of these demands were anathema to a majority of the committee. Consequently in mid-July the members reluctantly agreed to fall back on a compromise formula worked out in June by Soekarno and a handful of other non-Islamic and Islamic leaders.[20] This was the *Piagam Djakarta* (Djakarta Charter), which it was agreed would be made the preamble of the new constitution, while the key clause of this document, for Islamic groups, would be incorporated into article 29. The clause declared that the state is "based on Belief in the All-mighty God, with the obligation to carry out the Sjariah Islam for the adherents of Islam." [21] What with Muslim expectations and their suspicions of *prijaji*-nationalist and like-minded leaders, this was not altogether satisfactory for the Islamic vanguard.[22] Not only

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Vol. I; B. R. O'G. Anderson, *Some Aspects of Indonesian Politics under the Japanese Occupation, 1944–45* (Ithaca: Cornell Modern Indonesia Project, Interim Report Series, 1961); Dahm, *Soekarno.*

[20] See Anderson, *Aspects*, pp. 26–31.

[21] ". . . berdasar kepada: Ketuhanan jang Maha Esa, dengan kewadjiban mendjalankan Sjariat Islam buat pemeluknja." My translation has the same ambiguity as the original; that is, who is responsible for carrying out the Sjariah? Islamic leaders assume, and in the context of the original discussions seem to be correct, that the obligation is incumbent upon the state to enforce the Islamic law. See Yamin, *Naskah,* esp. pp. 371–388, and Daniel S. Lev, *The Transition to Guided Democracy: Indonesian Politics 1957–1959* (Ithaca: Cornell Modern Indonesia Project Monograph Series, 1966), pp. 128–129. Leaders of non-Islamic organizations, however, have argued that the obligation to carry out the Sjariah was meant to be a private one, incumbent upon every Muslim but not enforceable.

[22] Anderson, *Aspects,* pp. 30–31. Muslim leaders in the preparatory committee (BPKI) seemed to fear that something would be put over on Islam, which anxiety was not unfounded but somewhat exaggerated. At one point in the tense discussions of July 15, Abdul Patah Hasan stated that Muslims might feel that the wording of article 28 (2) on freedom of religion was really a subtle suggestion (*suggestie halus*) that Muslims leave Islam to return to some other religion. Supomo, the chief constitutional draftsman, quickly agreed to change the wording. Yamin, *Naskah,* pp. 374–375. Basically, Muslim leaders, particularly such men as Ki Bagus Hadikusumo, Abdul Kahar Muzzakir, Achmad Sanusi, and perhaps Abikusno, were upset less by the vagueness of the Sjariah clause in the Djakarta Charter than by the realization that the constitution was simply not an Islamic constitution—whatever this meant, and there was very little agreement among Islamic leaders about it. As both Muzzakir and Hadikusumo insisted during the acrimonious debates of July 15, the state had to be Islamic or not, but in any case an honest decision should

did the wording of the clause leave room for equivocation, but Muslim leaders wanted firmer guarantees of the integral role of Islam in the new state. They insisted, *inter alia*, that the president must be a Muslim, which was finally granted. Nor was the Sjariah clause or anything similar satisfactory to most non-Islamically inclined nationalists, particularly Christians. Soekarno and the NU leader K. H. Masjkur had to make an exhausting effort to bring the ideological poles to delicate agreement on this compromise.

Even so, by mid-August, a month later, Islamic groups had lost the symbolic advantages of the *Piagam Djakarta* too. Evidently nationalist leaders, especially Soekarno and Hatta, with necessary assistance from Muslim mediators, were able to persuade crucial Islamic leaders to relinquish their hard-won concessions for the sake of national unity. Possibly the events of mid-August—the surrender of Japan, uncertainty about Dutch intentions, the kidnapping of Soekarno and Hatta by youth leaders just before the proclamation of independence—made it easier to win Islamic acquiescence by focusing all attention briefly on national and revolutionary symbols. On August 18, one day after the proclamation of independence, Hatta announced to a last meeting of the preparatory committee (PPKI) that the Sjariah clause was removed from both the body of the constitution and its preamble, along with the provision that the president must be a Muslim; otherwise, he said, the new state would be unacceptable to non-Islamic areas of the country.[23] Many Muslim leaders felt betrayed, however; time and again during the next two and a half decades Islamic groups demanded restitution of the full *Piagam Djakarta*.

THE MINISTRY OF RELIGION

Ultimately, though, the payoff for Islam was profitable in a practical sense. It was a Ministry of Religion, then unique in the Islamic world. The preparatory committee had actually rejected such a ministry, only six of twenty-seven members voting for it.[24] Instead, it was determined that the distribution of administrative authority over Islamic affairs should be kept as

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be made. Islamic groups were in the position essentially of begging for relatively minor and usually meaningless concessions.

[23] Yamin, *Naskah*, pp. 400–402.

[24] Ibid., p. 462. August 18, 1945, the same day the Sjariah clause was removed from the constitution. The strongest opposition to a Ministry

it was when the colony fell to Japan. Control over Islamic institutions would thus have been left to a bureaucracy fully dominated by non-Islamically oriented officials and politicians. The demand by Muslim leaders, during the late occupation and early revolution, for leaving Islamic affairs to the *ummah* itself was an attempt to escape this control. But by late 1945, when Indonesia's new political parties had already begun to emerge, further compromises had to be worked out between *prijaji*-nationalist groups on the one hand and Islamic nationalist groups on the other. The latter now had enough organizational power in the field to make up for their limited weight in republican deliberative councils. Consequently a new Ministry of Religion (Kementerian Agama) was established on January 3, 1946.[25]

This was a huge leap for Indonesian Islam, though its significance was barely recognized at first. In the colony, we have seen, Islamic affairs were largely subject to non-Islamic authority. The local *Pamong Pradja* in Java, and in time the departments of Internal Affairs and of Justice and the Office for Native Affairs in Batavia, divided among them the work of supervising Islamic administration. The Japanese occupation introduced a major structural change in this situation by creating a Department of Religious Affairs (Syumubu), which provided the institutional base and precedent for the later Ministry of Religion. This was really the first step in the development of the ministry, the further elaboration of which, however, depended upon a protective cover by Islamic political power. Along with the emergence now of national Islamic parties, the formation of a Ministry of Religion made it possible to consolidate the entire

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of Religion was expressed by the Christian Latuharhary, the longtime nationalist leader Iwa Kusumasumantri, and the nationalist educational leader Ki Hadjar Dewantara. Ibid., pp. 457–458. Yet the first official proposal of a Ministry of Islamic Affairs came not from Islamic circles, but from the nationalist scholar, Moh. Yamin, in a constitutional proposal to the Preparatory Committee on July 15. Ibid., p. 333.

[25] For a brief comment on the origins of the Ministry of Religion, see "Kementerian Agama," in *Agenda Kementerian Agama 1951–1952* (Djakarta; Kementerian Agama, 1952?), pp. 131–132, and Hadji Agus Salim, "Kementerian Agama dalam Republik Indonesia," in the same volume, pp. 123–128. The first Minister of Religion was Hadji Rasjidi, a Minister of State in the second Cabinet led by Prime Minister Sutan Sjahrir. On the background politics of this period, see Geo. McT. Kahin *Nationalism and Revolution in Indonesia* (Ithaca: Cornell University Press, 1952), and B. R. O'G. Anderson, *Java in a Time of Revolution* (Ithaca: Cornell University Press, 1972).

administration of Islam into a single nationwide body controlled by Islamic groups. Ultimately the result was to be a degree of specialization, centralization, and autonomy for Islamic institutions unimaginable without the new ministry. It also lent Indonesian Islam institutional adaptability and bargaining power, on a national level, which it would not otherwise have had, and without which in other Islamic countries religious administrative institutions have atrophied under the pressure of "secular" state political and bureaucratic expansion. At the same time, however, the creation of a Ministry of Religion also led to the consolidation of an Islamic bureaucracy, which at local levels tended to be defensively conservative and unresponsive, as before, to the influence of Islamic intellectual circles.

The Ministry of Religion was never fully accepted either by non-Islamically oriented nationalists or, in some cases, by Islamic groups themselves. For many *prijaji*-nationalists Soekarno among them, it was a necessary evil, the price of getting along with organized Islam. But it was an evil that could be turned to advantage, not merely by buying off Islam, but by dividing it and keeping the support of Muslim traditionalists—particularly in the Nahdatul Ulama—whom Javanese *prijaji* leaders had normally been able to accommodate and even to manipulate. Among others, however, who took secular ideals seriously, the Ministry of Religion stuck in their craws. It was inappropriate to their conceptions of a modern state. Moreover, by maintaining a modicum of control over such critical affairs of the citizenry as family life, the Ministry of Religion fragmented and weakened the capacity of national government to modernize Indonesian society. Often enough, during the revolution and after the transfer of sovereignty in December 1949, individual members of the PNI, PKI, PSI (Socialist party), and others proposed that the Ministry of Religion be done away with. In 1952 a nonparty women's leader, Rangkajo Rasuna Said, accused the ministry of being worse than useless. "Politics is one thing and religion another," she declared, arguing that the spiritual well-being of the people was being sacrificed to a concern by ulamas with political issues and government salaries.[26]

[26] Among other things, Mrs. Rasuna Said said she was upset that while uplifting films from the People's Republic of China were censured, coarse and debasing films from America were not, and this, she insisted,

The ministry also aroused painful controversy within Islam. Two fundamental kinds of issues existed: one over the ministry and partisan conflict within Islam, the other over the relationship of the ministry to the whole Indonesian Islamic community. In the first case, the fragmentation of Islamic political organization made it inevitable that control of the ministry would be contested, primarily by Masjumi and by the Nahdatul Ulama after the latter had withdrawn from Masjumi in 1952. This will be mentioned again shortly. But almost from the beginning those who controlled the ministry tended to push their own favorite ulamas for various kinds of patronage. Smaller Islamic organizations—the party PERTI, the Atjehnese organization PUSA (Persatuan Ulama Seluruh Atjeh), the Djam'ijah Washlijah of East Sumatra, and others—were given short shrift by NU and Muhammadijah leaders in charge of the ministry in Djakarta. As most of these smaller groups were based outside of Java, mainly in Sumatra, while the NU and Muhammadijah were Javanese controlled, and as the leadership of the Ministry of Religion was heavily Javanese, the ministry was vulnerable to the frequently justified charge that it was Java-centric.[27]

The second issue, that of the Ministry of Religion and the Ummat Islam, was more difficult, involving as it did traditional doctrinal problems, differing conceptions of the Islamic struggle in Indonesia, and Islamic party interests. For many torn Muslim leaders it never became clear whether on balance the ministry would help the cause of Islam or hinder it. On the one hand, it

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was the result of politics. In addition, she was angered by the news that the Ministry of Religion would spend a great deal of money on a conference of ulamas to determine the first day of the Ramadhan fast—an issue of long standing. *Ichtisar Parlemen* [Parliamentary debate summaries] 53/1952, session of May 14, 1952, pp. 267–268. In the same session of Parliament, Moh. Saddak (P.I.R.: Greater Indonesia Party) and Saroso Harsono (PNI-Merdeka) also proposed abolition of the Ministry of Religion, on grounds, *inter alia,* that the budget should be used for development rather than an unproductive ministry. Prime Minister Wilopo (PNI) made no bones about the political costs of trying to get rid of the Ministry of Religion. "The Government and our country now face enough problems which are very difficult. . . . And the Government has no desire to add any new difficulties." He went on to make some stock statements about the importance for development of the ministry. *Ichtisar Parlemen* 111/1952, sessions of May 14–21, 1952, p. 561.

[27] See, for example, the accusations made by the PERTI leader, H. Siradjuddin Abbas, *Ichtisar Parlemen* 59/1952, May 14, 1952, p. 291, and the Government reply in ibid., 111/1952, sessions of May 14–21, 1952, p. 562.

provided an opportunity for expansion and consolidation of Islamic institutions, gave Islam the prestige and protection of participation in government, and made funds and patronage available to Islamic organizations. It was a critical foothold pending further Islamization of Indonesia. And it proved that Islam was not being shoved aside ignominiously in the new state. On the other hand, however, the Ministry of Religion might ultimately serve to confine Islam, to restrain the Islamic struggle as a consequence of interests vested in the existing state through a growing religious bureaucracy. The temptation of religious officials by the prestige and comforts of government positions and salaries, apart from weakening bonds between formerly private Islamic leaders and the people, would make them that much less willing to work for a state based on Islam.[28] But above all, the very existence of a Ministry of Religion seemed to justify and lend permanence to a state that was patently not Islamic in form and substance.[29] Many of these fears turned out to be completely justified.

The measure of difficulties that beset the ministry and that the ministry itself posed for Indonesian Islam was illustrated by the complicated Ulil Amri Daruri issue, which caused some uproar among Islamic groups for several years after 1952. It was a controversy rooted in Muslim doubts about the Ministry of Religion and the anomalous position of the ministry in traditional Islamic doctrine.

The issue arose first of all out of an attempt by the Minister

[28] Opponents of the ministry, from both Islamic and politically non-Islamic circles, often insisted that as religious leaders took government jobs they neglected their spiritual and educational work. See the statement by Ja'cob Rasjid, chairman of the Consultative Committee of Islamic Organizations in Djakarta, who claimed that by 1952, 15,000 religious leaders throughout Indonesia had assumed government positions. This, he said, would change their way of life from leaders of the people to civil servants. A.P.B. News Service, August 30, 1952.

[29] Although the ministry is called Ministry of Religion rather than, say, Ministry of Islamic Affairs, and although it also includes sections for Catholic, Protestant, and Balinese Hindu affairs, these latter are relatively minor compared with the Islamic component. Other religious groups tend to ignore the ministry, holding representation in it mainly in order to make certain that their own interests are not threatened. The leadership of the ministry has always come from Islamic groups, and it is commonly regarded as serving Islamic concerns and interests. Nevertheless, the "religion" rather than "Islam" rubric has restricted the ministry somewhat, though slightly, for example in the use of budgetary resources and, at times, in the ideological posture of the ministry.

of Religion to assume authority of *tauliah wali-hakim*, the appointment of ritual guardians for brides whose closest male kin (*wali-nasab*) are unavailable.[30] In Java this authority had been co-opted by the ministry without challenge during the revolution. But in 1952 a ministerial regulation (4/1952) extended the rule to all territory outside of Java, delegating authority to designate *wali-hakim*, in the name of the Minister of Religion, to local offices of religious affairs directors.[31] The decision, for which the minister sought and received support from a conference of ulamas held in May 1952, was foreseen as early as 1946 in ministerial policy statements and new statutes. It was part of a consistent effort by the ministry to make application of Islamic law uniform throughout Indonesia, to centralize direction of Islamic administrative affairs, and to expand its own authority and patronage. In some parts of the country, the Minankabau area of West Sumatra among them, the policy was understandably contested by local religious officials, who saw this extension of central authority as an unwarranted intrusion and, correctly, as a threat. In addition, however, it was also contested in grander terms as interference by the state in religious affairs.

Now the Ministry of Religion was admittedly part of the apparatus of a non-Islamic state, one in which Islamic law was not fully implemented. Ministry officials themselves have always been careful to avoid claiming anything more and to deny any right to mix in the most intimate affairs of the Ummat Islam, though such denials are practically meaningless. Where, then, did the ministry get its authority to do anything in Islamic terms? As Emile Tyan has explained, the concept of delegation is central to the administration of Islamic law.[32] All mundane

[30] By Sjafi'i legal doctrine, a bride must be represented by a male guardian. If the closest male kin is unable to perform this function, for a number of stipulated reasons, a guardian must be appointed. In common Islamic practice a local *kadi* usually served as *wali-hakim*, as a delegate of the sultan.

[31] Peraturan Menteri Agama 4/1952. The regulation rescinded the authority given earlier to provincial religious office directors to appoint *wali-hakim* orally, and the authority of appointment given by any instance of the national government or self-governing area administration (*swapradja*). This was a direct and successful challenge to locally based traditional religious authority. See Kementerian Agama, *Laporan Tahunan 1954*, II, 807.

[32] Emile Tyan, *Histoire de l'Organisation Judiciaire en Pays d'Islam* (Leiden: E. J. Brill, 1960), pp. 102ff.

authority is ultimately located in the caliph or, as the case may be, a sultan. With respect to the problem of *wali-hakim*, for example, the sultan is *wali-hakim* for all brides who need one, and he delegates this function to an appropriate official. The Ministry of Religion's problem was that it was bereft of a sultan, a delegation of whose authority it needed in order to make marriages with a *wali-hakim* legitimate; and moreover to make itself legitimate. When the above regulation was protested in Parliament and elsewhere, the ministry called another conference of ulamas, this time at Bogor in May 1953. With so much at stake, the Minister of Religion probably took some care in issuing invitations to participate. Whether this was so, as some Muslim leaders later charged, the conference supported the 1952 meeting of ulamas, which recognized the minister's right to appoint *wali-hakim*. But it did more. In order to justify the decision, the conference reached into the authoritarian political traditions of Islam. From the time of the Prophet on, these traditions emphasized the point that any kind of ruler, even a non-Islamic one, was better than no ruler at all. The Bogor conference accordingly declared that even though President Soekarno was not a sultan in the meaning of the Sjariah, yet he was clearly the ruler of Indonesia and therefore could delegate authority to appoint *wali-hakim* to the Minister of Religion.

At this point the narrower and wider political implications of what was happening became apparent. In order to make itself legitimate in Islamic doctrine, the Ministry of Religion had to make the national government similarly legitimate. The popular sources of Soekarno's strength were apparent in that the conference focused on him as ruler, though he was then constitutionally only a figurehead. Again the conference of 1953 was protested, partly because several Islamic parties and groups had not been invited. It was also vehemently charged that Soekarno could not be considered ruler of the Republic of Indonesia. But basically it was more important that a serious ideological advantage was being handed to the non-Islamic state.

It was too late to stop the ministry from getting what it needed, however. A third conference of ulamas was convened in Tjipanas (West Java) in March 1954, under the leadership of Minister of Religion K. H. Masjkur of the NU.[33] This con-

[33] Masjkur was assisted throughout by H. Djunaedi, director of the Bureau of Religious Justice. Thirty-nine ulamas from all major

ference not only supported the views of all earlier meetings, but in addition stated definitively that the President, Cabinet, Parliament, and so forth, constituted a Waliyul Amri Daruri bi Ssjaukah. In its original meaning the Waliyul Amri (or Ulil Amri) was the highest leadership of the Islamic community, supposedly chosen by the faithful from among the most devout ulamas.[34] More practically the term (or Dzu Shaukah) referred to one who actually held power and therefore should be obeyed.[35] The Tjipanas conference was thus consistent in stating that the people should obey the Waliyul Amri Daruri, commonly assumed despite all to be Soekarno, and of course his delegates—in this case the Ministry of Religion.[36]

The reaction of Islamic groups—other than the NU, which was fast moving into overwhelming control of the ministry—was immediate and pained. The conference statement was condemned in the press, in Parliament, and in various public meetings on grounds that, as Indonesia was not yet an Islamic state, the title of Waliyul Amri Daruri was absolutely inappropriate and a terrible blow to the Islamic struggle.[37] Ministry leaders argued

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regions of the country attended the conference on the invitation of the Minister of Religion. A meeting was held a few days earlier in Djakarta with six leaders of PERTI, three from NU, and two from Muhammadijah to discuss a statement by PERTI which originally attacked the earlier conferences that had dealt with the *tauliah wali-hakim.* Kem. Agama, *Laporan Tahunan 1954,* II: 802–804.

[34] H. Datuk Palimo Kajo, "Ulil-Amri: masalahnja di Indonesia ini" [Ulil-Amri: the problem in Indonesia], *Hikmah* Nr. 13 (July 14, 1960): 5, 10.

[35] The Koran, Sura' Annisaa' (Women), 4, 59, Indonesian edition complied by H. Zainuddin Hamidy and Fachruddin, *Tafsir Quran,* 3rd ed. (Djakarta: Penerbit Widjaya, 1963), p. 122, which the Rodwell translation (4–62) gives as: "O ye who believe! Obey God and obey the apostle, and those among you invested with authority [Ulil-Amri]; and if in aught ye differ, bring it before God and the apostle, if ye believe in God and in the latter day. This is the best and fairest way of settlement." Also Th. W. Juynboll, *Handleiding tot de Kennis van de Mohammedaansche Wet,* 1st ed. (Leiden: Brill, 1903), pp. 336–337, and 337, n. 3.

[36] Kem. Agama, *Laporan Tahunan 1954,* II, 810.

[37] See, for example, the dailies *Haluan* (Padang), Feb. 20, *Pedoman,* Mar. 9, *Antara,* Mar. 15, *Abadi,* Mar. 22, all 1954; *Fikiran Rakjat* (Palembang), Aug. 9, 1957. During this period Islamic groups still hoped for a final victory in their quest for a "state based on Islam" in the Constituent Assembly, elected in 1955. But Islamic parties did not control enough votes in that assembly to be able to force through an Islamically oriented constitution. When the Constituent Assembly was suspended in July 1959, it still had come to no decision on the issue of state ideology. As

that the purpose of the declaration was related only to the *wali-hakim* problem. It was commonly supposed, however, that NU leaders had a few partisan gains in mind as well. Whatever the case, the ministry had given Islamic blessings to the state.

Yet this was perfectly consistent with Islamic political tradition. Despite the philosophical difficulty in Islam of separating state from religion, historically Muslim leaders have tended to ignore the legality and morality of government in power so long as the faithful could keep their faith.[38] Usually this has meant honoring the *ibadah* ritual obligations and Islamic

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Clifford Geertz has noted, NU members often justified the Ulil Amri decision as merely a temporary, stop-gap measure, pending resolution of the struggle over the ideological basis of the state. Clifford Geertz, *The Religion of Java* (Glencoe: Free Press, 1960), pp. 212–213. A Sumatran Muslim leader, Sofjan Alie, revealed soon after the Tjipanas conference that the Ministry of Religion's Bureau of Religious Justice had earlier written a letter to the party council of PERTI stating that Indonesia was not yet an Islamic state and that President Soekarno was not yet the Ulil Amri. Sofjan Alie posed a number of hostile questions to the Minister of Religion about the decision, most of which summed up to the implicit point that the ministry had violated the law, spirit, and struggle of Islam in Indonesia. *Lembaga* (Medan), March 19, 1954.

[38] G. E. von Grunebaum, *Islam: Essays in the Nature and Growth of a Cultural Tradition,* 2nd ed. (London: Routledge & Kegan Paul, 1961), p. 132. Grunebaum notes the disinclination of learned ulamas to collaborate in government and politics, with the result of "an increasingly deep cleavage between legal theory and executive practice." It is possible however, that this disinclination originated not merely in an unwillingness to be sullied by political systems that refused to be guided fully by the Sjariah, but also in the protection that a more narrowly defined responsibility offered to the ulamas. Political leaders undoubtedly encouraged this view. Thus a kind of implicit Caesar-God bargain was struck in practice, but never accorded religious legitimacy. The tension of this arrangement remains with Islam. Grunebaum's point about the political participation of ulamas does not apply fully to twentieth-century Asian Islam—in Indonesia, Malaysia, India, and Pakistan. The reason, more so in Indonesia and pre-partition India than in Malaysia and Pakistan, probably is the rise of distinct party organizations on a base of Islamic symbols. Religious leaders either had to rally to these parties or lose their right to the symbols; at least they had to become more active politically as religious causes became embroiled in turmoil. In Indonesia many such religious leaders and officials were quickly absorbed by the Ministry of Religion—though private ulamas remain of course—so that their political participation was in fact rather narrowly confined. They may indeed have been relieved by the development, for the same reason that conservative Indian ulamas refused to support Pakistan and remained in India: this alleviated the pressure of change in favor of a religious tradition over which they retained control and in which their responsibilities remained securely stable.

rules of family law. Muslim governments created new civil and criminal law as it was needed, along with suitable administrative institutions which existed clearly outside the ken of religious doctrine. Although religious leaders carped at these unholy deviations, harking back to an increasingly unreal age of the first four caliphs, the fact is, as Grunebaum mentions, that *de facto* rulers were fairly quickly recognized *de jure*. The resulting ideological tension was like a persistent low-grade infection, bothersome and occasionally debilitating but seldom fatal.

The same has been true in Indonesia. Many Muslim leaders, certainly in the Ministry of Religion itself, probably accepted the practical hopelessness of achieving an Islamic state, even if a majority of Muslims could agree on what it should be. While ideological requirements of the political system, and particularly the party system, compelled Islamic leaders to talk about a state based on Islam—and many pursued it with complete commitment—they were willing to settle for much less. The Ministry of Religion was not doctrinally satisfying, but it gave Islam and Muslims in Indonesia more than they had had before.

By the 1950s the ministry became a primary but inchoate base for Islamic politics. A battleground for major Islamic groups themselves, it yet provided official status and shelter for a large number of Islamic politicians. In the parliamentary elections of 1955, twenty-one of forty-five NU members and fifteen of fifty-seven Masjumi members elected were employed by the Ministry of Religion.[39] The general patronage of the ministry became enormous. By 1963 it was fourth largest ministry of twenty-five (excluding Defense) in the central government, behind the departments of Education, Police, and Interior, and in addition was the fastest growing employer in the national bureaucracy.[40] Its staff was nation wide and village deep, with

[39] Statement of the ministry's secretary-general, Mohammad Kafrawi, in *Abadi* (Masjumi daily) April 3, 1956, cited by Herbert Feith, *The Decline of Constitutional Democracy in Indonesia* (Ithaca: Cornell University Press, 1962), p. 368, n. 75.

[40] Biro Pusat Statistik, *Statistik Indonesia: 1964–1967* (Djakarta, 1968) pp. 28–29, and a fuller statistical survey of government personnel for the year 1963 also published by the Central Bureau of Statistics. According to these materials, the Ministry of Religion's personnel grew from 26,868 in 1958 to 34,832 in 1963, which was by far the greatest rate of growth among larger departments during this period. This indicated the bargaining power of the ministry within the government. The relatively low level of education of Ministry of Religion personnel

considerable though often specialized and guarded influence. Within the central government, the ministry's political purchase was limited but could never be ignored entirely, particularly of course when Islamic issues were involved. The ministry's reputation and public prestige have never been high. Its officials tend by and large to come from nonaristocratic *santri* (devout Islamic) families, who have attended religious schools and possess few of the social attributes that mark the normal run of university-trained, metropolitan-oriented, high-ranking national bureaucrats. Many of them are indeed discomfited by close contact with social elite circles. These latter normally treat ulamas and religious personnel with some contempt and ridicule as a group that has to be lived with but not taken seriously in the work of modern government. Experience has dictated otherwise, however, and in exchange for its support of the "secular" state the Ministry of Religion has been able to secure its interests and extract patronage and finance.

From the time of the revolution the Ministry of Religion's interests have consisted, along with matters of political partisanship, of a fusion of bureaucratic drives with the protection of traditional Islamic administrative concerns. The creativity of the ministry has been evident less in innovation, though there has been some, than in the extension and consolidation of existing institutions along with the rationalization of Islamic administration. For Islamic law in Indonesia this has in fact meant a good deal of change and, what is more, an expanded capacity to absorb further legal change.

The impact of the Ministry of Religion on religious law in Indonesia became obvious very early, to those who were at all interested. The first major statute initiated by the ministry,

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is reflected, however, in the number of high-ranking civil service positions held by the ministry, level of education being one determinant of rank. While the ministry ranked fourth in number of personnel (in 1963) it ranked tenth in number of staff at F grade, the highest. In proportion of F grade officials to total personnel, the Ministry of Religion was second lowest (with 1:166) of all ministries (called departments in the 1960s) in the government, behind the national police, whose hierarchy worked on principles different from the others. But the ministry had the largest total number of C grade officials, the middle rank, where the promotion of many of them stopped for lack of higher academic degrees. The educational biases of the civil service regulations disadvantage religious officials who have come up through the Islamic schools.

Law 22/1946, made unmistakably clear an intention to unify the administration of marriage and divorce throughout the country under control by the ministry itself.[41] But the significance of the new law went even further.

The provisions of this statute can be dealt with briefly. Rescinding two colonial ordinances on Islamic marriage in Java, it provided that henceforth all Muslim marriages, divorces, and reconciliations (*nikah*, *talak*, *rudjuk*: NTR) would be brought under the solitary formal supervision of registrars (Pegawai Pentjatat NTR) appointed by the Minister of Religion or his delegate. These officials must register all marriages, divorces, and reconciliations and give copies of the registration to the interested parties. The seat of the PPNTR would be determined by local religious offices (Djawatan Agama Daerah, later Kantor Urusan Agama) directly controlled by the Ministry of Religion. Fees paid for registry, in nominal amounts determined by the Minister of Religion, would go to the state treasury, as per regulation by the Minister of Religion. Fines were levied against persons who married or divorced without registration, and either fines or imprisonment against registrars who failed to perform their functions properly or exacted more than official fees.

It was a remarkable statute, both for the clarity of its rationale and the extent and complexity of its goals. In many ways it epitomized what legal change in new states is about. But in this case the change was confined to Indonesian Islam.

First of all, the Ministry of Religion staked out an unequivocal claim to a monopoly of administrative control over Islamic marriage affairs. Law 22/1946 left no doubts on this score, but the victory had been implicitly secured by the emergence of the ministry itself, backed by politically mobilized Islam. But the ministry's assumption of that authority did not go uncontested. The law was debated in the revolutionary parlia-

[41] Undang-Undang 1946 no. 22, promulgated Nov. 26, 1946, while Faturachman was Minister of Religion. Koesnodiprodjo, *Himpunan Undang2, Peraturan2, Penetapan2 Pemerintah Republik Indonesia 1946* [Compilation of laws, regulations, and decrees of the government of the Republic of Indonesia, 1946] (Djakarta: Seno, 1951), pp. 73–78. Also J. Prins, *Adat en Islamietische Plichtenleer in Indonesie* (The Hague and Bandung: van Hoeve, 1954) pp. 99ff., and Sidik Soedarsono, *Masalah Administratif dalam Perkawinan Ummat Islam Indonesia* [Administrative problems in Indonesian Muslim marriage affairs] (Djakarta: Dara, 1965?), passim.

ment (KNIP), where nationalists of various kinds stood opposed. According to one Socialist (PSI) leader who participated in these discussions, he spoke out against any strengthening of either penghulus or Islamic law in the new state:

> As a Socialist he did not want Islamic law to have a powerful place. He wanted government civil law in all fields. But during the revolution Islamic groups made every attempt to gain greater recognition for religious law. He opposed this down the line. One instance in which the whole issue came up was over the registration of marriages. He wanted this taken care of by civil officials, so that every marriage would be a civil as well as religious marriage. Islamic groups wanted penghulus to have full control over marriages now, eliminating whatever civil influence had been established during the colonial period. . . . But the Socialists and others thought that it would be unwise to get into a fierce struggle with Muslim groups at that point, what with the revolution against the Dutch still going on, and the Muslims were granted their way. Socialist leaders, especially himself, though understanding that Muslims had to be placated to avoid a serious split, nevertheless regretted this grant of authority to Islam as a step backward. Now Islamic officials supervise Muslim marriage rules everywhere in Indonesia. [Jan. 10, 1960]

For Muslim leaders there never was any question but that the Ummat Islam had to control this critical portion of family law. It was religious law, it was emphatically part of the Islamic struggle, and historically it was the one area of Islamic law that Muslims would not surrender without a fight.

Second, Law 22/1946 promised uniform administration of Islamic marriage rules throughout Indonesia. Of course this could not be accomplished during the revolution, all the more so outside of Java, and ministry officials recognized that it would take years to make the law effective under any circumstances.[42] Yet for the first time national applicability of Islamic family law became a distinct possibility. In this effort the Ministry of Re-

[42] Clarification to Law 22/1946, Koesnodiprodjo, *Himpunan*, p. 77. It was stated specifically in the clarification that the law was intended for all Indonesia, but that until conditions permitted, it would be applied to Java and Madura alone. A future law would extend the new order to the rest of the country. It was this new law, in the form of a ministerial regulation of 1952, which helped to set off the Ulil Amri Daruri issue. Regulations of 1954 and 1955 secured the expansion.

ligion was impelled not only by the Islamic struggle and its own interest in exercising more authority, but also by a common revolutionary impulse to unify the country, to obliterate the effects of colonial divide-and-rule policies, and to assert the authority of new national leadership.[43]

Related to the drive for unification, but important enough in its own right to be called a third point, was the Ministry of Religion's interest in eliminating or weakening local authority structures in favor of national ones. The Ulil Amri Daruri conflict brought this problem into clearer focus after the transfer of sovereignty, but the revolutionary period set the stage for it. A struggle between national and local authority has been common in new states. Indeed, it has been part of the historical development of all states, and is inherent in the creation of distinctly national instruments of governance, whose growth inevitably threatens the range of local political authority. How much national Islamic officials in Indonesia were preoccupied with this struggle, as were other leaders of the republic, was indicated in the clarification of Law 22/1946. Explaining the rescission of colonial statutes that had provided for official registration of marriages and the like, the clarification stated that those laws were "provincialist and no longer in accord with the present situation. The State of Indonesia is a unitary state, and it is appropriate for the laws of this state to be unitary too." [44]

It was the revolutionary mobilization of large parts of Indonesian society that made Law 22/1946 and similar laws conceivable. The rest of the government was doing the same thing with respect to civil institutions, extending them outward and downward partly in response to popular appeals from the institutional symbols of nationhood. In the next chapter it will be shown how nationalist-controlled ministries, riding the wave of this revolutionary fervor of nationhood, tried to abolish Islamic courts altogether. But Islamic groups rode the same wave, only an Islamic segment of it.

[43] Law 22/1946 rescinded two colonial laws on Muslim marriage—the Huwelijksordonnantie S. 1929 No. 348 along with the related provisions of S. 1931 No. 467 and the Vorstenlandsche Huwelijksordonnantie (for the princely states of Central Java) S. 1933 No. 98. A third statute applying to the outer islands (S. 1932 No. 482) was not immediately struck, but was left in effect until further regulations could extend the new legal regime of Law 22/1946 outside of Java.

[44] Koesnodiprodjo, *Himpunan*, p. 76.

Fourth, the new law sought to bring about reforms already demanded in the 1930s with respect to all Islamic officials. Registrars were to be paid, so that they would not resort to corruption, and registration fees were made uniform everywhere.

Fifth, the statute promised a measure of legal certainty and stability to Islamic marriage by requiring registration in the first place. The Dutch colonial administration had tried to push through a similar requirement in 1937, as part of a broader effort to reform Islamic marriage rules, but the whole plan was rejected by Islamic leadership as an unwarranted intrusion into Islamic affairs. Now the simple requirement of registration was established, but without any threat to such fundamental institutions as polygamy. In their concern with registration, Ministry of Religion officials were influenced not only by the need for rationalization, but also by an interest in modernization. Prins is probably correct in supposing that the European civil registry (Burgerlijke Stand) was an important model.[45]

Nothing was said in the statute about changing the substantive law of matrimony, nor were Islamic marriage rules even mentioned anywhere in the text of the law.[46] The irrevocable religious law of marriage already existed, after all. During the next two and a half decades of independence efforts would be made to establish a new national law (or laws) of marriage, all of them unsuccessful as of this writing. But in reality policies of the Ministry of Religion with respect to administrative change brought about what have to be considered substantive changes in the Islamic law of marriage in Indonesia. Rules were now to be applied—and in practice were increasingly applied—which had not been applied before. A new set of authorities was established in several areas of the country, mainly after 1950, whose legitimacy was connected partly with the legitimacy of religious

[45] Prins, *Adat en Islamietische Plichtenleer*, p. 100. Sidik Soedarsono also makes the point that Law 22/1946, along with Law 32/1954 which extended and refined the earlier statute, in effect formed a limited Burgerlijke Stand for Indonesian Muslims. *Masalah Administratif*, p. 128.

[46] Sidik Soedarsono, ibid., pondered the point that Law 22/1946 might be unique in the history of legislation, in that it was a procedural statute which preceded the substantive law for whose implementation it provided. This author was dealing with problems of a prospective statute on marriage, however, while for those who drafted the 1946 statute the substantive law of marriage had been established long ago by the Prophet and learned scholars of early Islam.

law itself, but also with something more that stood between religious authority and state authority. These officials, subject to a national hierarchy, implemented rules in new ways. For many people the law in practice was different from before, and consequences flowed which had not occurred previously. For them, it was substantive legal change.

INSTITUTIONAL AUTONOMY AND SOCIAL-RELIGIOUS CLEAVAGE

Before turning, in the following chapters, to the place of Islamic courts in this history, the developments we have dealt with so far need to be summarized briefly and related to conflict within Islamic social and political structure in Indonesia.

What the emergence of the Ministry of Religion, supported with or without enthusiasm by full-blown Islamic parties, meant for Islamic institutional change was the sudden achievement of a high degree of autonomy. In most parts of the Islamic world, the opposite was happening. Arab nationalism generally confirmed and accelerated patterns of change that constricted Islamic administrative institutions. Their autonomous existence was, if anything, decisively reduced in favor of expanding civil bureaucracies. But in Indonesia the logic of growing institutional autonomy for Islam was inherent in the Ministry of Religion. Having made this concession to Islam, nationalist leaders were constrained to let it do something. What it did, first of all, was to extract Islamically related functions from all other, usually recalcitrant and hostile, parts of the government.

Protected by Islamic parties, and enjoying a measure of sacrosanctity in any case because of the delicacy of Islam as a problem area of Indonesian politics, the Ministry of Religion was able to guard the integrity of its institutional clientele. Moreover, it did not become the hopelessly disorganized and bumbling fiasco nationalist politicians expected. On the contrary, without other models to rely upon, the Ministry of Religion imitated other ministries and soon began to develop the kinds of bureaucratic expertise it needed. It has always suffered personnel deficiencies, more qualitative than quantitative, but not so much so that it has been incapable of pursuing its ends with reasonable efficacy. Within a few years of its creation, the ministry was organized into four functional departments: Religious Affairs, Education, Information, and Justice. These of-

fices formed the now greatly expanded religious bureaucracy, and through them a measure of centralization and rationalization of traditional Islamic institutions could proceed more easily.

This process of change has had to take place, however, within limits imposed not only by historical and local variation and by competition for authority within the state bureaucracy generally, but also by conflict within the Islamic community itself.

The newfound autonomy of Islamic institutions was and is conditioned by social and ideological cleavage within Islam and by the varying accommodation of major Islamic leadership groups with the "secular"—in this case, non-Islamic—state. Seldom could principal Islamic organizations work together for very long, because they represent different social clienteles and religious programs. Prewar rivalry between the modernist Muhammadijah and the traditionalist Nahdatul Ulama was submerged for a time in Masjumi. Having little in common other than representing different brands of Islam, however, the two organizations fell out, partly over the issue of leadership within the umbrella party. In 1952, with encouragement from President Soekarno, the NU left Masjumi.[47] As in colonial times inland Javanese ulamas had been able to work out a *modus vivendi* with Javanese aristocratic and Dutch authority, the same was true of the Nahdatul Ulama in independent Indonesia. The NU could and did work in relative harmony with the (also predominantly Javanese) PNI and with President Soekarno. Masjumi, on the other hand, more of an Indonesian than a Javanese party, fell increasingly into conflict with the other major centers of power and was eventually abolished in 1960. After the coup of 1965 a successor party emerged, the Partai Muslimin Indonesia (Parmusi), but faced the continued hostility of President Suharto and the military-based government that displaced Soekarno. Part of the NU's reward was a secure place in the government, where the Ministry of Religion became its fortress. After 1950 only one Minister of Religion, K. H. Fakih

[47] On the departure of NU from Masjumi, see Feith, *Decline*, pp. 233–237. One issue in the split was the feeling of NU leaders that they were being shortchanged on cabinet positions, which normally went to Masjumi leaders from the Muhammadijah and related sources of the modernist, urban Islamic elite.

Usman in the Wilopo Cabinet (April 1952–June 1953), was from Masjumi. It was partly the choice of Fakih Usman as minister, in fact, that decided NU leaders on leaving Masjumi. Thereafter the NU successfully reduced Masjumi influence in the ministry. A few Masjumi members remained in most ministerial departments, with the notable exception of justice, and the active secretary-general of the ministry until 1959, Moh. Kafrawi, was closely connected and intellectually compatible with modernist circles. But there was never any doubt of NU's complete domination.

The Nahdatul Ulama's accommodation with non-Islamic authority in the new state was reinforced by the equally accommodating religious bureaucracy. Or perhaps this should be put the other way around, for both the older and newer parts of the Islamic bureaucracy—judges, mosque officials, village *naibs* on the one hand, religious office, education, and information personnel on the other—developed an interest in not seriously challenging the status quo of government organization.

What is essential is that the NU was able to consolidate its control over the bureaucracy through its control of the Ministry of Religion, whose authority extended outward from Djakarta to all Islamic Indonesia. The religious bureaucracy itself was by and large receptive, for reasons of doctrine as well as interest. This is particularly relevant to problems of Islamic justice, because religious judges, traditional Islamic bureaucrats par excellence, were and remain conservative in their legal views. Changing their attitudes, or at least their practice, would have been most difficult under the best of conditions. But NU ministers of religion and their staffs never felt any compunction about requiring rather strict conformity with conservative interpretations of Islamic law, in accord with NU doctrinal positions.

Reformist Masjumi leaders were left on the outside to look in on the bureaucracy, if they cared to—and not only Masjumi leaders, but Islamic intellectuals generally, in the parties, universities, press, and literary circles. It was mentioned in the last chapter that Islamic intellectuals and bureaucrats were not sympathetically connected during the colonial period. If anything, they were mutually hostile. In the independent state this condition did not improve. Islamic intellectuals, themselves a variegated group, have had to support the Ministry of Religion on Islamic issues. But lacking influence, they generally have ignored

Islamic officialdom.[48] No new link was forged between these two groups, intellectuals and bureaucrats, that might have given the one a better understanding of the structure of Indonesian Islamic tradition and the other a deeper sense of the pressures and possibilities for change. But then the experience of most other Islamic countries indicated that the chances of bringing these groups together was slim anyway.

None of this has meant total lack of innovation. It has been mentioned that significant innovation of a kind took place in the Islamic law merely by the more consistent and regular imposition of reasonably uniform, nationally directed, Islamic administration. Nor are all religious bureaucrats conservative. What it has meant may be seen from two perspectives, that of the administrator of Islamic law and that of the religious intellectual. In the first case, religious administrators, even when interested in bringing about change in the application of religious law, lack the kind of ideological basis for thinking about it that intellectuals are best able to provide. This is another way of saying, in an Islamic context, that traditionalists and reformists have continued to keep one another at arm's length. It is the second case which is more striking, however. This is that Islamic intellectuals, particularly legal thinkers, partly for other reasons of political structure that will be discussed in our conclusion but also because they are denied regular and above-board access to the religious bureaucracy, have themselves remained remarkably conservative in their attitudes toward legal change. Out of touch with the bureaucracy, yet also out of touch with effective political authority, they have either eschewed discussion of Islamic social-legal change or, among those few who have stayed with it, have fallen rather far behind the debates on such questions in the rest of the Islamic world. This point will be taken up again more substantially in a later chapter.

[48] In mid-1969 I asked a leader of the Islamic student organization, Himpunan Mahasiswa Indonesia (HMI), a modernist group formerly associated with Masjumi, whether he knew anyone in the Directorate of Religious Justice. He was barely aware of its existence.

CHAPTER THREE

The Islamic Judiciary: Survival, Expansion, Centralization

THIS CHAPTER WILL DEAL WITH THE ACCELERATED AND tortuous evolution of the Islamic judiciary after the revolution in a primarily political and bureaucratic context. For the most part the courts were themselves only passive participants in the process. In this respect they acted out the part assigned to religious courts in other Islamic lands, symbolically and functionally significant but without much more than a subordinate place in politics and administration.

The first problems that faced the courts during and after the revolution were survival, then growth. Much was said, as before, about improving the quality of Islamic justice, but not much was done about it. Partly this was due to the difficulty of bringing about meaningful change with old personnel—the only kind available, given the political prerequisites—who felt threatened by anything more than minor administrative revisions. Moreover, despite complaints about poorly trained religious judges and the like, Islamic tradition had in fact long relegated the courts to a habitually mean condition, constantly compared ignominiously with the essentially unattainable (and unreal)

ideal of the earliest great *kadis*.[1] These problems apart, however, the question of quality was simply not foremost in the minds of Islamic leaders with power over the courts. During the initial phases of the postrevolutionary development of the Islamic judiciary, the major issue was not *how* the law would be applied but *whether*, and if so, by whom it would be applied. It was a procedural question of the first order, a question of political legitimacy and institutional authority. New Islamic courts came into being in the outer islands under the double thrust of Islamic political pressure from below and the political interests, organizational strategy, and bargaining power of the Ministry of Religion from above. In the next phases of unification, once the goal of expansion had been achieved, internal rationalization and control became more prominent considerations. Although in one sense the wider political concerns of expansion now gave way to bureaucratic tendencies and impulses, the political context of this process remained influential in terms both of Islamic relations with the secular state and of internal social and intellectual conflict within Islam.

SURVIVAL: INDEPENDENT EXISTENCE OR INTEGRATION IN THE SECULAR JUDICIARY?

When the Ministry of Religion was established, the Islamic judiciary represented the bulk of Indonesia's religious bureaucracy. It was an obvious choice with which to begin developing the ministry. Not only did the courts exist everywhere in Java and Madura, at least, but religious judges had already begun to organize before the war and still had leaders who were deeply conscious of institutional issues. Moreover, it was important at the time that the religious courts had a kind of institutional representative in the form of the Mahkamah Islam Tinggi, religious appeals court for Java and Madura. Though the Mahkamah Islam Tinggi had accumulated little prestige in its short existence, and in fact still has little, its chairman, Kijai Adnan, had a strong following among Islamic judges.

By the end of the occupation the religious judiciary was still under the direction of the Ministry of Justice. No move was made by Kijai Adnan or anyone else connected with re-

[1] See Snouck Hurgronje, "Islam," in *C. Snouck Hurgronje: Selected Works*, G. H. Bousquet and Joseph Schacht, eds. (Leiden: Brill, 1957), p. 70.

ligious justice to change this condition immediately. But when the Ministry of Religion was created, it had little to do, for no responsibilities had been assigned to it. Evidently the Cabinet, having made this concession to Islam, now simply ignored the ministry and the minister both. Minister Rasjidi soon appealed to Kijai Adnan to bring the Islamic courts into the Ministry of Religion. According to Adnan, who felt at the time that he had some freedom of choice in the matter, he agreed on condition that Rasjidi undertake not only to prevent any further decline of the Islamic courts but also to see to their positive improvement and the restoration of powers lost before the war. A few steps toward improvement—salaries for judges and other demands from the 1930s—were made in Law 22/1946. But little else happened, despite rather ambitious statements about the future of Islamic courts, and years later Adnan expressed considerable regret over this failure to fulfill the promise.[2]

There was not much time to worry about quality, even had anyone with adequate power been inclined to do so. Nationalist law leaders were eager to use any opportunity to eliminate Islamic courts. Their failure was due to no lack of effort. We have already seen that during the late occupation Professor Supomo and others broadly hinted that it might be a good idea to abolish the religious courts. The attempt did not stop there. Even after the Islamic judiciary had been brought under the wing of the Ministry of Religion, nationalist officials in the Ministry of Justice made a few unsubtle and ultimately unsuccessful efforts to legislate Islamic courts out of existence.

The first attempt was Law 19/1948, which never was implemented because of events during the revolution, mainly the

[2] The Mahkamah Islam Tinggi, along with the lower courts, moved from the Ministry of Justice to the Ministry of Religion by Penetapan Pemerintah [Government decree] no. 5/S.D., March 25, 1946. Koesnodiprodjo, *Himpunan,* 1946, p. 166. In an interview on Oct. 24, 1960, Kijai Adnan indicated that Minister of Justice Soewandi, with whom he got along well, had no objection to transferring the religious courts out of his ministry. This sort of graciousness between government ministries became rare in later years. It may have been due in part, along with Soewandi's gentle nature, to the general confusion of the time and the fact that the Ministry of Justice was itself in process of pulling its affairs together. In any event, Adnan, quite old and retired by the time of this interview, felt that the transfer had done nothing for the quality and powers of the Islamic courts. He regarded them as much the same as they had been in the Dutch period, with only minor changes.

Dutch capture of Jogjakarta. Law 19, which clearly expressed the ideals of nationalist lawyers and political leaders, provided for the complete integration of the civil judicial system and for the weakening and eventual elimination of adat courts. The statute made no mention at all of a distinct sphere of Islamic justice, thus implying its demise. Instead it provided that Islamic litigants contesting Islamic legal issues would be tried by first instance or appellate courts with a Muslim chairman and two judges expert in Islamic law.[3] It is unlikely that those who drafted this law in the Ministry of Justice tried to consult with either the Ministry of Religion or Islamic groups about the issue. Islamic officials obviously would have objected—though a few Islamic intellectuals, particularly trained lawyers among them, might not have—but the statute turned out to be meaningless anyway.

A second legislative effort to eliminate religious courts was more circumspect and less ambitious. Law 1/1951, on the organization and procedure of civil courts, again provided for a unified civil judiciary and the gradual abolition of adat courts. But while it called attention to the limitations of Islamic courts, this statute recognized their separate existence. Its drafters (in the Ministry of Justice) suggested hopefully, however, that the Government would consult Parliament about transferring jurisdiction over issues of Islamic law to first instance civil courts (*pengadilan negeri*).[4] Consideration has in fact been given this possibility, which will be taken up shortly. The difference between 1948 and 1951 was that by the latter year, in the independent state, Islamic parties were paying a great deal of attention to such institutional issues in Cabinet and Parliament. Moreover, Islamic mobilization was now less confined by a dwindling revolutionary momentum.

It may be that the anxiety caused by these nationalist pres-

[3] Arts. 35 and 45, Undang-undang 19/1948, June 8, 1948, Koesnodiprodjo, *Himpunan*, 1948, pp. 62–74.

[4] "Undang-undang 1/1951 tentang tindakan2 sementara untuk menjelenggarakan kesatuan susunan, kekuasaan dan atjara Penugadilan2 Sipil" [On provisional measures for the unification of the organization, powers, and procedure of Civil Courts], in J. H. Scheers, V. F. M. Hartog, and W. Sidabutar, *Susunan Pengadilan dalam Negara Republic Indonesia* [Judicial organization in the Republic of Indonesia] (Djakarta: Pustaka Rakjat, 1952). This statute was never discussed by Parliament, which somehow bypassed it in its concern with other pressing political issues.

sures prodded the Ministry of Religion to pay more attention to the religious courts, though ministry officials were themselves independently concerned to undertake some internal reorganization that affected the judiciary. At first, as the new ministry gathered up the bits and pieces of Islamic affairs to itself, the courts were given no special consideration. Partly because they were not taken very seriously, and because the judicial role in Islam is conceived rather much in administrative terms, the courts were placed under the responsibility of the newly created Office for Religious Affairs (Djawatan Urusan Agama), which had other functions as well. After the transfer of sovereignty, however, as issues of Islamic courts and law arose—the *wali-hakim* problem, for instance—the ministry's leaders conceded that the religious judiciary deserved its own division. In 1952 a Bureau of Religious Justice (Biro Peradilan Agama) was established alongside the offices of Religious Affairs, Education, and Information.[5] The prestigious example of civil constitutional theory—in this case, separation of executive and judicial functions—may well have influenced this reordering. Unacknowledged borrowing of this kind in procedural concepts and practices, an implicit mark of the higher status of civil institutions in the eyes of Islamic officials themselves, was fairly frequent.

Henceforth, the Bureau (later Directorate) of Religious Justice took charge of establishing Islamic courts in the outer islands, defending them from attack when necessary, and doing whatever could be done to control procedural rectitude when this seemed called for. With the new bureau, the Islamic judiciary appeared to be securely ensconced in the state's legal machinery.

But Islamic officials never became completely confident

[5] Peraturan Menteri Agama nos. 9 and 10, and Penetapan Menteri Agama no. 41, 1952. Also report of the Biro Peradilan Agama in Kem. Agama, *Laporan Tahunan* [Annual report] 1954, vol. II, pp. 703ff. For the earlier organization of the Ministry of Religion see Peraturan Menteri Agama no. 2, 1951, and on the hodgepodge arrangements during the revolution, Peraturan Pemerintah no. 33, Dec., 1949, Koesnodiprodjo, 1949, pp. 134ff.

The other functions of the Bureau of Religious Justice included appointment of *wali-hakim,* determination of ritual dates, and determination of ritual procedures for state ceremonies connected with Islam. In some ways it also served as a kind of *mufti,* or Islamic legal adviser, which does not exist in Indonesia in any official format. But judicial affairs take up most of the bureau's time.

that Islamic courts were safe from outside challenge, that they would not finally be done away with. Even as they defended the *pengadilan agama* (religious court) from attack and demanded the return of jurisdiction over inheritance in Java, there was constant anxiety in the ministry that Islamic courts might not last.[6] Particularly was this so during the years of Guided Democracy, when the integrative and aggrandizing drives of all national institutions, including the secular judiciary, were especially strong. During this period, beginning in 1957, Soekarno developed enormous personal power, the political system expanded rapidly and became somewhat involuted, and mobilization became its most prominent characteristic. The Nahdatul Ulama was left rather much to its own defenses when Masjumi was abolished in 1960 after a rapid decline beginning with the outbreak of regional rebellion in 1958. Organized Islam all but gave up the ideological banner of a state based on Islam, and was, for the time being, only one part of the Nationalism-Religion-Communism (NASAKOM) triumvirate. For NU leadership this was not an uncomfortable position; nor was it for the Islamic bureaucracy. But it did reduce slightly the political leverage of the Ministry of Religion.

The limited powers and (outside of Java) limited history of Islamic courts made them seem especially vulnerable to external aggression. They were in any event dependent upon secular courts for execution. In those *kabupaten* where *pengadilan negeri* (first instance civil court) judges happened to be sympathetic to Islam or not very aggressive, relations between Islamic and civil courts were quite good, if rare. But civil judges often refused to cooperate with Islamic courts, whether because of anti-Islamic feeling or merely a strong competitive and self-protective sense. Particularly was this so in the outer islands, where Islamic courts and secular courts uncertainly shared jurisdiction over

[6] Rumors to this effect often made the rounds of Islamic official circles during the 1950s, and there is no doubt that many lawyers, including some in the Ministry of Justice, wanted to see Islamic courts done away with completely. At the Ministry of Religion's annual conference in Tretes (East Java) in June 1955, Minister Kijai Masjkur reported a proposal—by whom, he did not say—that Law 19/1948 on judicial organization, which would have absorbed Islamic justice into the civil judiciary, be put into effect. He opposed this, of course, though in hedging terms. *Konperensi Kementerian Agama ke-VI* (Djakarta: Kementarian Agama, 1956), pp. 48–49.

inheritance. (It should be remembered that the 1930s legislation removing Islamic court jurisdiction over inheritance applied only in Java and Madura.) Thus an Islamic court decision on inheritance for which an executory order was requested by one of the litigants might be rejected by the *pengadilan negeri* (or *pengadilan tinggi*, appeals court) whose judge would insist that the case be tried anew according to local adat law. Even in divorce and support actions in Java a request for an executory decree might tempt a *pengadilan negeri* judge to examine whether procedural proprieties had been followed by the Islamic judge; the condition of Islamic judicial procedure makes such a review a worrisome matter. But as long as this sort of problem remained local and sporadic, Islamic justice officials could live with it. In 1960, however, the Directorate of Religious Justice was badly shaken by a decision of the Supreme Court in a case that had originated in the *pengadilan negeri* of Makassar. The relevant portions of the decision are as follows:[7]

> In consideration . . . that the original claim was brought before the Pengadilan Negeri in Makassar and registered on 31 June 1958 . . . ;
>
> that the basis of the claim is an inheritance dispute, in which the claimants argue that the land in dispute is the estate of the late woman Saida and that the claimants and the respondents are her heirs, and that, moreover, they are all Muslims;
>
> that for all areas outside of Java and Madura . . . Government Regulation no. 45/1957 is in force, in which regulation it is provided, *inter alia*, that Islamic courts are competent to examine issues of inheritance which according to the living law should be decided according to Islamic law, but that these courts shall not have jurisdiction if the applicable law is not Islamic law;
>
> In consideration that the Supreme Court regards it as clear that in all of Indonesia with respect to inheritance it is essentially the Adat law which applies, which in areas where the influence of Islam is strong contains more or fewer elements of Islamic law;
>
> In consideration that therefore it can be said that, in accord with the law applicable to Java, Madura, and the area of Bandjermasin in Kalimantan, it is the Pengadilan Negeri which is competent to decide inheritance cases;
>
> In consideration that the Pengadilan Tinggi of Makassar

[7] Supreme Court decision Reg. no. 109 K/Sip/1960, mimeo.

> distinguished two matters in the original claim: (1) a request that the heirs of the late Saida be designated, (2) a request that the portions of each heir be determined;
>
> In consideration that the Pengadilan Tinggi . . . then determined that it is the Pengadilan Negeri which is competent to determine the first matter and the Pengadilan Sjar'iyah (Islamic court) the second matter;
>
> In consideration that the Supreme Court's view does not distinguish these two problems and is of the opinion that both matters are concerned with an inheritance issue and that both . . . fall under the jurisdiction of the Pengadilan Negeri to decide. . . .

The chairman of the Mahkamah Agung was evidently aware that this decision would disturb religious circles and sent a copy of it to the Directorate of Religious Justice. Because Supreme Court decisions offer the bare bones of the reasoning behind them, there was little to indicate the limits of the court's intent. Judge A. Hakim of the Mahkamah Agung later explained in an interview:[8]

> The *pengadilan tinggi* made such an error because its judge . . . was thinking in terms of the old idea that in the outer islands it is the Islamic law that is strong. But this is not so, and in many areas of Sulawesi there is deep conflict between the Islamic law and the local living law. The Mahkamah Agung (Supreme Court) in cassation overruled the appeals court, saying that the *pengadilan negeri* does indeed have competence in the case, all the more so since the dispute was originally brought to the *pengadilan negeri.* If this decision causes the Department of Religion great concern, it is not the fault of the Supreme Court. The Supreme Court is obliged to apply the living law of the area. . . . The Department of Religion should not misunderstand the case, for an important consideration for the Mahkamah Agung was the point that the case first went to the *pengadilan negeri.*

In effect, the Supreme Court now made explicit what was before more or less tacitly understood: that the jurisdiction of Islamic courts in inheritance issues outside of Java was certainly not exclusive. But for religious justice officials, at first, it appeared to be an attempt to slice away the competence of Islamic courts.[9]

[8] Nov. 24, 1960. The order of my notes has been changed somewhat for clarity's sake.

[9] Thereafter, relations between local Islamic courts and secular

A more general threat came from the Ministry of Justice, as it grew more serious about drafting a new statute on judicial organization. It had been the historical experience of Islam that every time someone drafted a new law on judicial organization, Islamic courts lost power. Now there was some muted concern that perhaps another effort, as in the revolution, would be made to do away with Islamic courts. Here, as on so many issues, Islamic intellectuals and bureaucrats were far apart. Thus, two legally trained Islamic leaders, one from Masjumi, and the other from the secondary urban-metropolitan wing of the NU:[10]

> There have been and are views which favor consolidation of religious and civil courts. This is preferable to having the courts continue in their separate existences. The advantage of consolidation is that there would no longer be any need for executory decrees and the like. The consolidation could be accomplished by way of bringing qualified religious judges into the *pengadilan negeri.* They would then hear cases related to religious justice. Of course some groups have opposed this too, especially Islamic groups, because removing the Islamic courts would mean decreased contact and importance for the Islamic law. . . .

> The existence of the *pengadilan agama* works against strong Islamic law in Indonesia. The reason is that in the present situation the PA has no competence over anything but NTR [marriage, divorce, reconciliation] and even in that its decisions require executory decrees from the PN's. I question the wisdom of having the PA's under the jurisdiction of the Ministry of Religion, rather than within the regular courts . . . for by standing apart with only very limited powers, they can do nothing at all to strengthen the Islamic law.

These were fairly common views among Islamic intellectuals. On the one hand, the Islamic courts were regarded as weak, essentially useless, and a mark of national disunity. On the other

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courts were often interpreted in terms of the appellate court's eagerness to use the above decision as a weapon. Thus while the *pengadilan tinggi* of Makassar has not in fact relied much upon it, the *pengadilan tinggi* of Medan has, much to the dismay of local religious courts and the Directorate of Religious Justice. That there has not been a more general confrontation is clearly the result of the considerable discretion which local courts exercise in practice.

[10] The first comment is from an interview on March 2, 1960, the second, August 8, 1960.

hand, for more ideologically inclined intellectuals, the separate existence of Islamic courts meant an isolated existence in which the ideas of religious law could have no real influence in society. The Islamic judiciary was, in this view, outside the mainstream of modern Indonesian development.

For the Islamic bureaucracy, of course, these attitudes were unacceptable and by and large irrelevant. But there were important exceptions in the Ministry of Religion among officials who leaned toward more national and less parochial conceptions of the evolution of Islamic institutions. All the major divisions of the Ministry of Religion are staffed by a number of "bureaucratic intellectuals," primarily from the NU but also a few from other Islamic parties, whose backgrounds include either some modernist education or at least some influence by modernist literature. More significantly, they tend to be less doctrinally than pragmatically concerned and deeply aware of the limitations of Islamic politics in the independent state. As members of the Djakarta bureaucracy, moreover, they are also skilled in institutional politics and the uses of a central apparatus with legitimate authority and power. The Directorate of Religious Justice has often been led at the highest echelons by men of this type.[11]

It is not altogether surprising, then, that the leadership of the directorate decided rather early that a measure of coalescence between the Islamic and secular judiciaries might be advantageous. Ministry of Justice officials had long considered the possibility of creating an Islamic chamber in the Supreme Court, along with chambers of military and administrative justice. At least one judge with expertise in Islamic law would then handle appeals from second instance Islamic courts. Secular justice offi-

[11] From the beginning the heads of the Directorate of Religious Justice have come from rather similar backgrounds. They are usually local NU leaders, from north coast Javanese penghulu families, who have moved up in the party and bureaucracy and, often, have served for a time as judge or clerk in the Mahkamah Islam Tinggi before being appointed to the directorate in Djakarta. K. H. Ahmad Zabidi Saubari, who in 1958 succeeded the first head of religious justice, the late H. Moehammad Djoenaidi, served for a time as ambassador to Saudi Arabia in the mid-1950s. In any event, these men are familiar with both village Islam and national urban politics. Within the NU, along with such leaders as the occasional Minister of Religion, K. H. Iljas, they tend to be quietly on the "left" in significant social issues—for example, the position of women, family planning, and the like.

cials conceived such a reorganization in integrative terms. It would bring the Islamic courts under the surveillance of a single national supreme court, whose judges would have some influence on the substantive law applied by the Islamic judiciary. Islamic political leaders, however, consistently opposed such a reform, and in Parliament (DPR-GR) argued that the Mahkamah Islam Tinggi should remain separate and independent.[12] In part they feared an eventual obliteration by absorption of the Islamic courts. But in addition, for many Muslim leaders, Islamic institutions had to remain independent of other government institutions and bound to the *ummat* so long as Indonesia had not yet become an Islamic state. In this view any interference in Islamic affairs by the secular state was abhorrent and dangerous, as threatening now as it had been during the colonial period. Officials in the Directorate of Religious Justice, however, had a different perspective, which they tried to impress upon Islamic politicians after parliamentary discussions of the law on judicial organization in 1964.[13] They were unwilling to give up administrative control of the *pengadilan agama*, but appeals were a different matter.

> [A high official in religious justice] noted that in discussions within the Department [of Religion] led by [Minister] Iljas, he had frankly argued that the MIT should be placed in the Mahkamah Agung. He fears that Islamic parties in Parliament cannot really defend religious courts otherwise. But more important, he believes that religious justice stands a dangerous chance of losing out altogether. He called up an analogy with the revolution, when he was a minor officer in a Hizbullah group [para-military organizations flying the Islamic banner]. At the time among his fellow Hizbullah members there was a discussion about whether to join the TNI [national army]. The Hizbullah and Sabillilah were reluctant, were isolated, and then easily abolished later by presidential decree. . . . By making the MIT a part of the Mahkamah Agung, it moves up to a higher level, participates in the state and the state's prestige, and is assured a permanent place. . . .

[12] In Java men usually think of the Mahkamah Islam Tinggi as the highest Islamic court for all Indonesia, though its jurisdiction is limited to Java and Madura. There are Islamic appellate courts outside of Java, created during the 1950s, with competence equivalent to that of the Mahkamah Islam Tinggi.

[13] Interview with K. H. Zabidi Saubari, Oct. 28, 1964.

> In connection with this he made a strong point—which he also argued in discussions within the Ministry—concerning the relationship of Islam to the state. He said that many have questioned whether Muslims regard Indonesia as their state. And he seemed to admit there is legitimate question about this; thus, how did the Darul Islam [rebels] regard the state? Among opponents of Islam there is some, perhaps justified, feeling that perhaps Muslims do not regard Indonesia as their state at all. He argues that Islam must now make its commitment perfectly clear. It must become fully involved in the state itself if—he implied, without saying it—Islam is to survive. He went on to point out that the Koran, after all, provides that litigants may accept a judge appointed even by a *kafir*. Thus there is no reason not to accept a secular state.[14]

By 1968 the ministries of Religion and Justice were agreed on the creation of an Islamic chamber, but religious officials were anxious enough to insist that the chairman of the Supreme Court should be qualified to understand Islamic legal problems. This demand was insecure hedging on the part of the Ministry of Religion, whose leaders probably feared that no Islamic judge would be able to deal on equal terms with the highly educated members of the Supreme Court. The sense of intellectual inferiority which Islamic bureaucrats have toward Western-educated officials is matched by *prijaji* disdain for the Islamic bureaucracy. As one member of the Supreme Court, himself a devout Muslim, put it in arguing against the appointment of an Islamic judge to the Mahkamah Agung: "Any appointment of an Islamic judge to the Supreme Court would necessarily be political; and how would it be if some *kijai* who doesn't know anything about law were appointed to the Mahkamah Agung?" (July 16, 1968)

At it turned out, the Islamic chamber did not materialize, largely because of this discomfited resistance from both Islamic and secular law groups, the former under some pressure from Islamic political circles. The revitalization of Islamic politics after the coup of 1965, when the Communist party was obliterated and President Soekarno fell from power, along with continued tension between Islamic and national leadership, undoubtedly set back the probability of such a development. Thus

[14] Oct. 9, 1964. This was a period during which the ideological pressures of Guided Democracy militated against notions of Islamic independence. But it is worth repeating that historically the Islamic bureaucracy in Java has usually taken similar views.

in 1966, at a national conference (*muktamar*) of the Nahdatul Ulama, it was proposed that Islamic and secular judicial affairs be kept separate and that a new and independent Islamic Supreme Court (Mahkamah Islam Agung) be established. Officials in the Directorate of Religious Justice opposed this idea, and, more important, so did civil law leaders, and it did not come about.

In the new law on the organization of judicial powers promulgated in 1970 (as in a short-lived statute of 1964) it is provided only that judicial authority in the state consists of general justice, Islamic justice, military justice, and administrative justice. As far as the Supreme Court is concerned, one innovative extension of its authority over all spheres of judicial action is noteworthy. Chapter II, article 10 (3) provides that the Mahkamah Agung may hear appeals in cassation from military, administrative, and Islamic courts.[15] This may of course have a considerable impact in time, perhaps much more so than if an Islamic chamber had been created, particularly if such a chamber interpreted its role in primarily defensive terms. But the impact must depend on the use of this new appellate instance by litigants before Islamic courts, as well as on the posture of Supreme Court judges themselves.[16] It also depends more generally on two very deli-

[15] Undang-Undang tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman [Law on basic provisions of judicial authority] Nr. 14/1970. Article 11 provides unequivocally that the distinct spheres of justice—general, Islamic, military, and administrative (of which there is no institutional form yet)—remain organizationally, administratively, and financially under the authority of their respective executive departments. This article is very important to an understanding of the politics of judicial institutions that underlay some of the opposition to further integration of all judicial authority in the state. Civil judges have long sought separation of secular courts from the Ministry of Justice, to be organized administratively under the Supreme Court as an autonomous judicial hierarchy. Now only the Supreme Court itself enjoys such independence of the executive. The Ministry of Justice has opposed such a separation, because it would radically reduce the significance of the ministry; the public prosecution succeeded in withdrawing from the ministry in 1960. Partly in order to assure its continued administrative authority over civil courts, the Ministry of Justice therefore argued also for the status quo with respect to the organization of Islamic and military justice, and of course the ministries of Religion and Defense agreed.

[16] At present two or three Supreme Court judges are strongly Islamic in religious orientation, but only one of them has had a long association with Islamic party activity and a deep interest in the development of Islamic institutions. This judge favored creation of an Islamic chamber in the Supreme Court, and inclined also to the eventual integration of Islamic courts into the *pengadilan negeri*. In general, however,

cate sets of relationships: those between political and bureaucratic leadership in the Islamic community, and those between the symbols of the Islamic struggle and the symbols of the civil state.

EXPANSION OF THE ISLAMIC JUDICIARY OUTSIDE OF JAVA

The process by which Islamic courts spread through the outer islands was linked to the more general Islamic struggle at national and local levels. In historical perspective it was part of the long growth of Islam in Indonesia. And each advance by Islamic institutions was perceived as a loss for nationalism, secularism, non-Islam, anti-Islam, adat, or whatever, depending upon how one looked at it. In Djakarta the ministries of Justice and Interior often opposed or refused to cooperate with the Ministry of Religion's efforts to strengthen Islamic courts. Sometimes this was for political and bureaucratic reasons—for example, reluctance to relinquish local authority—and sometimes for ideological ones. In the localities of Sumatra, Kalimantan, Sulawesi, and elsewhere the opposition to Islamic expansion was equally evident among adat authorities, who had much more at stake. This too was part of a long process of conflict, between opposing principles of social organization and legitimate authority. Although adat leaders were already losing power to national institutions, they often successfully sought to collaborate with them against the spread of Islamic institutions. Political absorption by the state left hope for ultimate survival, for it need not mean much more than a change of symbols. But displacement by Islam meant the imposition of a new and hostile order of authority.

Once established, the Ministry of Religion embarked on the same integrative course of unification and centralization as the one followed by the rest of the government. The cornerstone of its efforts was the local Office of Religious Affairs (Kantor Urusan Agama: KUA). KUA were set up throughout the country on the basis of a national office which the Japanese military administration had created in Java to replace the Kantoor voor Inlandsche Zaken, with local branches at the residency level. The Ministry of Religion established KUA branches that ran now from the ministerial division in Djakarta through prov-

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Supreme Court judges show no enthusiastic interest in Islamic legal affairs, and it remains to be seen what kinds of attitudes will develop among them with respect to Islamic issues brought before them.

inces, *kabupaten*, and subdistricts (*ketjamatan*) down to village religious officials (*naib*, *modin*, etc.) who were incorporated into the hierarchy. Serving both political and religious-legal functions, the KUA at the *kabupaten* and subdistrict levels often became centers of Islamic activity in local communities.[17] By the mid-1950s control of them was vested primarily in local NU leaders.

The relationship between the KUA and religious justice was critically important from the beginning, particularly in the outer islands but also in Java. Ministry officials saw the KUA as the essential instrument for achieving uniformity in Islamic legal affairs.[18] KUA branches were linked to the religious courts partly by their own judicial functions. For example, in connection with their administrative responsibility for registering marriages, divorces, and reconciliations, KUA officials could (and sometimes do) try to settle marital disputes before they get to court. As it happened, these very judicial functions, along with the political primacy, newness, and tendency to role expansion of the KUA, led to a certain amount of competition between local KUA and Islamic courts. In the early 1950s the KUA, through the central office in Djakarta, claimed the right to annul marriages entered into on the basis of false information from one spouse or another, while Islamic justice officials insisted that only religious courts were competent to annul marriages. In January 1954, a conference of the Ministry of Religion in Semarang ruled that the courts should have jurisdiction.[19]

Apart from these problems, however, the KUA was in fact crucial in bringing order to Islamic justice and expanding its territorial scope. Where *pengadilan agama* already existed, as in Java, the KUA offered policy guidance and helped in problems of legal interpretation. Where they did not yet exist formally, in many areas outside of Java, KUA officials assumed the necessary judicial work themselves and frequently cleared the way for establishment of permanent Islamic courts, sometimes by bringing pressure to bear on the ministry itself.

The situation confronting the Ministry of Religion with

[17] For example, see Clifford Geertz, *Religion of Java* (Glencoe: Free Press, 1960), pp. 200ff.

[18] Interview with Secretary-General of the Ministry of Religion, Moh. Kafrawi, Aug. 26, 1959.

[19] This decision was reinforced by a ministerial regulation, no. 2/1954. See also Kementerian Agama, *Laporan Tahunan* 1954, II, 714.

respect to Islamic justice outside of Java was a difficult one. On the one hand, there was opposition to any expansion of the Islamic judiciary from nationalist leaders, lawyers, secular judges, and the Ministry of Justice, itself concerned with expansion of the secular judicial system. We have seen that Ministry of Justice officials had tried to abolish Islamic courts altogether during the revolution. The existence of a national Ministry of Religion helped to prevent this. But the recalcitrance of the Ministry of Justice and other government offices made it necessary for the Ministry of Religion to avoid working through Cabinet and Parliament.[20] The more effective approach seemed to be to encourage development of local Islamic courts, sometimes through the formally questionable and frequently challenged use of ministerial regulations, and then to face the Government with *faits accomplis*, which it had to recognize. From 1950 through about 1960 Secretary-General Kafrawi and the head of the Biro Peradilan Agama, H. Djunaedi, followed this course of action.

On the other hand, the condition of Islamic courts outside of Java was variegated, uncertain, and confused. Ministry officials, mostly from Java and usually concerned primarily with Java, did not always understand the place of religious courts elsewhere. They were, moreover, constrained by watchful opponents to pay some heed to formal legal requirements that did not favor Islamic courts in several regions, Atjeh being the foremost example. Nevertheless, the outer islands demanded their attention. A policy evolved of concentrating more or less on the development of Islamic justice outside of Java, where Islam is commonly supposed to be stronger than in Java and where local pressures could be used to establish new courts and strengthen old ones. Ministry leaders hoped, in addition, that successes in the outer islands might eventually provide advantageous feedback to Java itself.

[20] Not all Ministry of Justice officials were vehemently opposed to religious courts, however. Ministry of Religion officials felt, in fact, that it was a few Christians in the Ministry of Justice who were most sympathetic and helpful to religious efforts. This was especially true during the early 1950s, when at least two Dutch officials who remained for a time with the Ministry of Justice helped to calm anxieties in their own ministry about the affairs of Islamic courts. It seems that one of these men also gave advice to the Ministry of Religion concerning the religious courts, possibly in connection with their colonial law background. This kind of advice was badly needed in the Ministry of Religion because of its lack of personnel with adequate legal background.

Notwithstanding the greater proportion of Muslim population in the outer islands, Islamic courts had never made the same institutional headway there as in Java. Nearly everywhere in Indonesia the essential condition for the spread of Islam was that pre-Islamic authorities would convert without basically sacrificing the institutions of their authority. Wherever, as in Java, specialized political institutions had emerged more or less free of kinship ties, pre-existing courts were often Islamized. But where the level of institutional specialization was low and kinship remained a primary determinant of political authority, Islamic courts frequently did not occur at all. Rather, as has been indicated earlier, in some areas—for example, Atjeh, West Sumatra (Minangkabau), South Sumatra, and parts of Kalimantan and Sulawesi—Islamic affairs were in varying degree handled either by penghulus or by local adat councils. Elsewhere outside of Java, as in Java itself until the late nineteenth and twentieth centuries, Islamic courts depended on the pleasure of local sultans, even more so perhaps than in most Islamic countries. These sultanates—in East Sumatra, West and East Kalimantan, parts of Sulawesi, and the Lesser Sundas—were "self-governing" in the colony, and Islamic courts there were independently regulated by agreements between the sultans and the colonial administration. The result was some variation and, more significantly for the emergence of national Islamic institutions, a lack of supra-local orientation among religious officials who were closely linked to local authorities. While the competence of these courts was often greater than in Java—they retained jurisdiction over inheritance after Islamic courts in Java had lost it—they were basically less independent than Javanese Islamic judges, who by the 1930s had already begun to evolve an island-wide orientation more or less distinct from traditional Javanese political authority. This pattern was reinforced by the more rapid development of Islamic political parties in Java than elsewhere, resulting from differences in local political organization and the uneven impact of colonialism.

The revolution set the stage for further change. Revolutionary mobilization, by throwing up new nationally oriented political symbols and weakening local adat authority, facilitated the expansion of the national civil judicial system. The same was true of the Islamic judiciary, which could not have spread through the outer islands without demands generated for them

by local Islamic groups. But this evolution was slowed (though not by much) precisely by the opposition of competing civil institutions.

Emergency Law 1/1951 had abolished or anticipated the abolition of adat courts everywhere in Indonesia, "except Religious justice where according to the living law [*hukum jang hidup*] such justice forms an independent part of Adat justice." [21] Religious justice would be provided for separately in a government regulation.[22] It was imperative, before such a regulation was considered, for the Ministry of Religion to establish the strongest possible position for Islamic courts. This was not easy. As no general law or regulation existed to make new Islamic courts legal, their status was uncertain and a good deal of obstruction was possible. Furthermore, the ministry was short of funds. And in the several regions local KUA officials differed in aggressiveness and imagination; in some areas there were few KUA offices.

Two major problems had to be dealt with outside of Java, except where Islamic courts already existed and were legally recognized. The first was to get all Islamic administrative authority transferred to the KUA. The second was actually to create new Islamic courts, something that could be done during the revolution without formal legitimation but not so easily afterwards. Thus in those parts of South Kalimantan where the colonial reorganization of 1937 was still in force, the first instance Islamic courts (Kerapatan Qadi) and the appeals courts (Kerapatan Qadi Besar) were by 1952 brought under the authority of the Bureau of Religious Justice. But in East Kalimantan, where the local sultans agreed in 1951 and 1952—the Kalimantan sultanates were abolished only in 1954—to surrender their Islamic

[21] Art. 1, par. 2, a. and b. "Living law" was a formulation invented during the revolution to permit some escape from the rigidities of colonial concepts of adat law.

[22] It is an interesting question why it was provided that a government regulation (*peraturan pemerintah*) should arrange the affairs of Islamic courts. A government regulation is distinguished from a law (*undang-undang*) in that Cabinet approval is sufficient for enactment of the former, while Parliament must pass the latter. It may be that the drafters of Emergency Law 1/1951 were, in effect, subtly relegating Islamic courts to a less than serious status. Ultimately, however, this favored efforts of the Ministry of Religion, for it might have been a great deal more difficult to get a law on religious justice through Parliament than the Cabinet.

judicial authority to the Ministry of Religion, the KUA had to assume the judicial functions of the older courts pending legislation setting up new courts. In West Kalimantan the sultans of Pontianak and Sambas also agreed to turn over the jurisdiction of their Islamic courts to the Ministry of Religion. But the *bupatis* of the area refused for a time actually to surrender control over officials of these courts.[23]

In Sulawesi the many minor kingdoms (*swapradja*) were abolished in August 1952, before representatives of the Ministry of Religion were able to work out agreements similar to those in Kalimantan. The KUA office in Makassar pressed the ministry for instructions to set up new Islamic courts, but none was forthcoming. In late 1952 the issue of Islamic courts was thought serious enough in Makassar for the governor to consider establishing such courts with a regulation of his own, though nothing came of it.[24] For several years, then, the KUA apparently handled Islamic legal affairs, including disputes, throughout Sulawesi. Resolutions from local legislative assemblies (DPRDS) in Sulawesi and a question in Parliament accomplished little. No one who wanted to do so, in effect, had the power and authority to create new Islamic courts.

Moreover, Sulawesi (and no doubt Kalimantan) was less important politically and less demanding of the Ministry of Religion's time than other areas. It was in Sumatra, a critical area for Islam and for national politics generally, that conflict between Islamic and other forces was most evident in the development of the Islamic judiciary. Atjeh, as always, caused the most difficulty for nearly everybody concerned. During the Japanese occupation of Atjeh religious groups had been conceded new though limited Islamic courts.[25] Following the "social revolution" which had nearly wiped out the *ulèebalang* aristocracy in late 1945 and early 1946, in August 1946 Islamic groups established religious courts, called Mahkamah Sjariah, all over the countryside.[26] Elsewhere in Sumatra Islamic groups had also begun to

[23] Much of the material presented here was culled from official correspondence in the archives of the Directorate of Religious Justice, to which I am grateful for permission to see it. The documents will not be cited specifically in most cases.

[24] A copy of the draft "Governor's Regulation" was sent to the Bureau of Religious Justice by the provincial KUA of Sulawesi.

[25] A. J. Piekaar, *Atjeh en de Oorlog met Japan* (The Hague and Bandung: van Hoeve, 1949) pp. 278–284.

[26] According to an Atjehnese scholar whom I interviewed in Medan

demand such courts, often taking the Islamic judiciary in Java as their model; for religious leaders in areas where Islamic institutional development had been rigidly constricted, Javanese appearances seemed remarkably developed. Partly with these demands in mind, but also in the hope of establishing some control over what appeared to be a wild situation in Atjeh, in January 1947 the Republican governor of Sumatra, Tengku Moehammad Hasan (also an Atjehnese), sent out telegrams to all republican residents in Sumatra ordering the establishment of Islamic courts, called Mahkamah Sjariah as in Atjeh.[27] This was done in several areas. But in Atjeh, with support from PUSA, the major Atjehnese Islamic organization led by the feared and respected Daud Beureueh, these courts assumed jurisdiction over a wider subject matter than Islamic courts anywhere else in the archipelago: not only matrimonial and related questions, but also *wakaf*, inheritance, wills and gifts (*hibbah*), and portions of estates to be surrendered to the state treasury (*baitulmal*).[28]

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in May 1960, the major reason for creating the new Mahkamah Sjariah was to provide jobs for the large number of "ulamas." Ideological reasons were undoubtedly of equal importance, however. The courts were at first established at the subdistrict, district, and *kabupaten* levels, with an appeals court for all Atjeh in Kutaradja (Banda Atjeh). In 1948 the *kabupaten*-level Mahkamah Sjariah was abolished.

[27] Telegram no. 189 (to Atjeh), Jan. 13, 1947. On Feb. 11, 1954, Hasan issued a statement in Djakarta explaining that he had sent these telegrams because of the many requests he received while governor to establish Islamic courts like those in Java. In this statement he alluded to Law 23/1947 (Jogjakarta) which abolished the radjas' courts of Java (in the princely states of Jogjakarta and Surakarta) and Sumatra, giving the impression that his action followed this law. In fact, his telegrams preceded the law, promulgated in August, by about seven months. But it is true that the adat courts of Atjeh were already gone and those of East Sumatra were about to disappear.

[28] The *baitulmal* consists of monies collected from Muslims and paid into the state treasury for social purposes. For example, parts of an estate remaining after various heirs have received their stipulated share would be given to the *baitulmal*. In the few cases involving *baitulmal* that the Mahkamah Sjariah in Atjeh actually heard and on which I have notes, the funds were evidently turned over to the KUA. The Mahkamah Sjariah of East Sumatra also claimed such authority, but as nearly as I have been able to discover never rendered any decisions concerning *baitulmal*. The competence of the Atjehnese Mahkamah Sjariah was formally determined by the Atjehnese legislative assembly (Dewan Perwakilan Atjeh) on Dec. 3, 1947. But apparently the provincial Religious Office of Sumatra in Medan and the Atjehnese Religious Office were taking initiatives in setting up the courts and fixing their competence that the resident (Amin), who was probably not in agreement, had to follow.

Jurisdiction over inheritance issues was specifically denied the secular state courts.[29]

In other parts of Sumatra the formation of Mahkamah Sjariah did not get so far before the Dutch returned. The Dutch administration also established new Islamic courts, however, largely in the hope of winning Islamic acquiescence in the restoration of Dutch authority.[30] In East Sumatra, where the violent elimination of local sultans had also eliminated their courts, new and uniform Islamic courts (Madjelis Pengadilan Agama Islam) were established during this period and later became something of a model for Islamic courts outside of Java and Madura.[31] But the chief effect of these courts that the Dutch created in East Sumatra was to provide a formal basis in law for their own continuation. Like other previous legislation, laws and regulations left behind by the Dutch in areas that they controlled during

[29] Some uncertainty existed over this issue, however, partly because it was not clear in Atjeh whether the central (republican) government would approve the religious courts taking over all inheritance matters. Resident Amin might have warned the legislative assembly and religious leaders about this. In the assembly decision and in telegrams sent by Amin on Dec. 8, 1947, to *bupatis* and other *Pamong Pradja* officials in Atjeh, it was stated that *pending further regulation* by either the provincial government in Medan or the central government, inheritance issues would be decided by the Mahkamah Sjariah and *not* the secular courts. Another difficulty in these developments was that the *pengadilan negeri* in Atjeh also had a number of religious leaders sitting as judges, and they apparently felt politically secure enough to contest the claims of the Mahkamah Sjariah. The latter were able to win a good deal of what they wanted, however, because provincial authorities feared that Daud Beureueh might try to impose the whole of Islamic law throughout Atjeh. Giving in on inheritance and related matters might stem a more violent tide.

[30] A. A. Schiller, *The Formation of Federal Indonesia* (The Hague and Bandung: van Hoeve, 1955), pp. 328–332. Also Sufjan Hamzah, "Kedudukan Peradilan Agama di Sumatera" [The position of Islamic justice in Sumatra], *Mimbar Indonesia,* Sept. 24, 1955, which was read in manuscript from the files of the Directorate of Religious Justice rather than in published form. This is by far the most informative article available about the condition of Islamic courts outside of Java during the early 1950s.

[31] Ibid., and interview with director of the KUA of North Sumatra, April 21, 1960, in Medan. The KUA head, who participated in the creation of the new courts during the federal period, indicated that they had continued in the same form from 1947 until the present. One court was established in each of the old sultanates of East Sumatra; the sultanates were wiped out violently in an East Sumatran "social revolution" in 1946. The competence of the new Islamic courts included inheritance.

the revolution were kept in force in the independent state until superseded.

This was not the case with revolutionary legal acts of the sort that had established the Mahkamah Sjariah in Atjeh, as opponents of Islamic courts argued. After the transfer of sovereignty Islamic officials and political leaders in Atjeh flooded the Ministry of Religion with demands that the Mahkamah Sjariah be recognized and, importantly, that their judges be paid. For years the ministry avoided the issue, replying that nothing could be done because the revolutionary Islamic courts did not have a sufficient legal basis.[32] Ministry officials may have worried about the budgetary difficulties of absorbing so many judges. Moreover, many of these judges were not old-line bureaucrats, but had moved into the courts laterally from the "social revolution." In 1953 Atjeh broke out again into rebellion led by Daud Beureueh, under an Islamic banner, which made it even more difficult to insist that Islamic institutions be granted more authority there than in the rest of the country. Ministry leaders probably did not want to do this anyway because it would reflect on Islamic political efforts elsewhere. Consequently it was not until 1957, after enormous pressure had been brought to bear by Atjehnese religious officials and political leaders, working in combination with a few officials in the Bureau of Religious Justice, and by the parliamentary committee (E) on religious affairs, that the Mahkamah Sjariah in Atjeh were finally regularized.[33]

[32] It was in answer to this argument, which opponents of Islamic justice pressed against the Ministry of Religion, that former governor Hasan explained that he had issued instructions via telegram in January 1947 that Mahkamah Sjariah should be established everywhere in Sumatra. But this was considered legally inadequate, and it was not reinforced by a law or regulation of the central government. Others, particularly Sufjan Hamzah (himself Atjehnese), pointed out the irony that while the courts created by colonial authority in East Sumatra could be recognized, those created by revolutionary action in Atjeh could not. Moreover, Hamzah argued, the Mahkamah Sjariah in Atjeh did in fact exist, and were going concerns, trying cases and applying law which reflected the desires of the Islamic community. Hamzah, "Kedudukan Peradilan Agama di Sumatera."

[33] Peraturan Pemerintah [Government regulation] 29/1957. In January 1956 Sufjan Hamzah surveyed the Mahkamah Sjariah in much of Atjeh, and finding them to be basically in poor condition, with inadequately trained and responsible personnel and with very little financial support from the KUA, which had taken them in, worked out plans with religious officials in the area to bring pressure to bear on the ministry to place the Mahkamah Sjariah under the direction of the Bureau of Religious Justice rather than the KUA. Atjehnese religious circles then

By then the decline of the Atjehnese Islamic courts, due to lack of funds and the uncertainty of their existence, made it possible to bring them into line with Islamic judicial organization in the rest of Indonesia. This will be taken up again shortly.

In the rest of Sumatra, the problem was not a proliferation but a paucity of functioning Islamic courts. Despite pressure by Islamic parties and groups, they did not have quite enough power to brush aside opposition to the creation of new Islamic courts from local adat-committed groups and the *Pamong Pradja*, the centralized regional administration of the Ministry of Interior.

In East Sumatra, once the Dutch had left and the federal state had joined the unitary republic, the Madjelis Pengadilan Agama Islam fell into disorder but were revived and funded by the Ministry of Religion. This was accomplished through ministerial Regulation 2/1953, which established Islamic courts in every *kabupaten* of East Sumatra except for Simelungun and Karo—Christian areas, which had one court between them. Soon afterward, however, the appeals court (*pengadilan tinggi*) for Central and North Sumatra in Medan rejected the authority of these Islamic courts on grounds that Emergency Law 1/1951 required a government regulation, not a ministerial regulation, for the ordering of Islamic courts.[34] This did not really threaten the existence of Islamic courts in East Sumatra, for they could fall back on the Dutch regulations, but it challenged their status, made relations with the secular courts delicate, and raised the specter again of an effort to abolish Islamic courts altogether. In the Lampong area of South Sumatra a *pengadilan negeri* (first instance civil court) also rejected an Islamic court decision for which an executory decree had been requested, arguing that the religious court had no basis in law. An attempt by the Ministry of Religion to establish new Islamic courts in Lampong in 1952 was rejected by the Resident of the area because such courts

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began to send a great deal of material, including various petitions and resolutions and the like, to Djakarta. For his part, Hamzah raised the issue in the bureau, the ministry, and the Djakarta press, building up considerable Islamic support for the cause of Islamic courts in Atjeh. Before this, the matter had been raised both through Atjehnese correspondence with the ministry and at conferences held by the ministry, but with little result.

[34] Sufjan Hamzah, "Kedudukan Peradilan Agama di Sumatera." The case arose on appeal from the *pengadilan negeri* of Tebingtinggi, which had granted an executory decree for a decision of the Islamic court.

were not provided for in the law of 1932 (S. 1932–80) that reorganized outer-island adat courts.

This last incident, along with similar ones in Riau and Palembang, may help to explain why, despite governmental eagerness, it took so long to abolish the adat courts of South Sumatra. Elsewhere in the archipelago, except for parts of Sulawesi, adat courts that remained after the revolution were eliminated with relative ease in the early 1950s. But in South Sumatra a ten-year struggle was needed before the old adat courts were finally done away with. This struggle, in which defenders of the adat courts held their own for a time against an opposition oriented to national institutions, also encompassed an equally tense battle between Islamic courts and adat courts, which reflected another kind of contest for survival and authority in the new state. Mahkamah Sjariah had been established in South Sumatra in 1947. They were replaced by Dutch-sponsored Islamic courts during the revolution; at the same time the Dutch military administration created a new adat appeals court (*rapat tinggi*) in Palembang. When the revolution ended, the earlier Mahkamah Sjariah were revived. Their legality was challenged by regional nationalist politicians and by local Ministry of Interior officials, and the Ministry of Religion was able to secure definitely only the Islamic court of Palembang (on the basis of a ministerial decree and reference to colonial legislation), whose jurisdiction extended no further than the city limits.[35] Elsewhere in the province the Mahkamah Sjariah existed in a precarious state, legitimate Islamically but not legally.

In the colony South Sumatran Islamic legal affairs had been managed primarily by the local adat councils themselves. No doubt this was a satisfactory or inescapable arrangement during much of South Sumatran history, for it kept both religious and political authority firmly under control by traditional local elites. But it became obsolete, or at least much less generally acceptable, the moment this elite was itself challenged by the growing power of a newly organized Islam. When this happened, adat leaders turned for help to national officials, who were equally interested for nationalist and anti-Islamic reasons in keeping Islamic insti-

[35] See Ministerial Decree 15/1952; also Ki H. Abubakar Bastari, "Kehakiman dalam Islam" [The judiciary in Islam] in *Al-Djami'ah* (published by the State Institute for Islamic Studies, I.A.I.N., in Jogjakarta) vol. I/1, January 1962, p. 35.

tutional growth at bay. A kind of alliance was thus created between adat authorities and state authorities, based on a common antagonism to Islam that temporarily superseded the conflict between local and national authority. This alliance was, moreover, one between groups that enjoyed similar aristocratic origins; in the party world, the PNI was the main beneficiary.

Soon after the transfer of sovereignty, new KUA offices in the province of South Sumatra, armed with Law 22/1946, set about trying to obtain full control over registration of marriage, divorce, and reconciliation, and over other Islamic matters still handled by local adat councils. *Pamong Pradja* officials, under whose jurisdiction the adat courts now rested, refused to surrender this authority. They contended that Law 22/1946 did not apply outside of Java and Madura and had not rescinded colonial legislation on marriage and related matters in the outer islands. A decree of June 1949 by the Minister of Religion specifically applying Law 22/1946 to Sumatra and a proclamation (*maklumat*) of the ministry in 1951 that the law applied throughout Indonesia, were rejected as inadequate to supersede previous laws and regulations. Local officials thus gained considerable time by throwing the issue to Djakarta, where it would have to be decided by ministries equally committed to different clienteles. Formal legal provisions were used as elementary weapons in a conflict over more fundamental issues. At length in 1954 the Ministry of Religion succeeded in getting Law 22/1946 extended to all areas outside of Java and Madura.[36]

But this did not solve the problems of the Mahkamah Sjariah. Several matrimonial cases had arisen after 1950 in which adat courts, upheld by the *rapat tinggi* in Palembang, denied the jurisdiction of Islamic courts over divorce actions. In one such case, which caused an uproar in Palembang, a divorce (*fasach*) granted to a woman by the Mahkamah Sjariah of Lubuk-Linggau was invalidated by the *rapat tinggi* on grounds that this Islamic court had no jurisdiction. The *rapat tinggi* refused to recognize the existence of any courts other than adat courts (*rapat ketjil*, *rapat besar*) outside of Palembang City. With the support of the provincial KUA and the Islamic court in Palembang, however, the woman remarried. Her former husband, with the decision of the *rapat tinggi* in hand, brought the

[36] Law 32/1954, L. N. 98/54, Nov. 2, 1954.

case to the *rapat besar* of Lubuk-Linggau. Because she had remarried without a valid divorce, the *rapat besar* sentenced the by now pregnant woman to two years in jail. On appeal, again the *rapat tinggi* declared the new marriage invalid, sentenced the woman and her second husband to six months each for having violated the adat, and the religious official (*chotib*) who had married them also to six months in jail.[37] Islamic circles were incensed, the apparent injustice of the original *rapat besar* decision aroused considerable protest, and the ministries of Religion and Interior were brought into the issue by provincial KUA officials and the governor respectively. The governor, worried by the tension and hostility between local Islamic and *Pamong Pradja* officials, begged the Minister of Interior to work out the whole issue of competence with the Minister of Religion. Such talks were in fact held in Djakarta, but little was resolved on the broader issues. Under pressure from the governor's office, however, the *rapat tinggi* finally told the lower adat court that the sentenced woman should be permitted to live outside of jail.

The position of the South Sumatran Mahkamah Sjariah was further shaken in 1953 by a statement from the head of the civil law section of the Ministry of Justice, Professor Hazairin, that Islamic courts had no basis in law at all in Sumatra.[38] Indeed, he went even further to argue that they should be abolished forthwith. Had any other official in the Ministry of Justice made this statement, it might have been waved aside. What hurt and angered Islamic leaders was that Hazairin was one of Indonesia's foremost Islamic legal scholars, though one equally well known for his prewar study of adat law in Bengkulu, along the

[37] Rapat Tinggi decision no. 11/55/1888/21 Rad./M.U.P.R.T./Pidana. The sentence of the *rapat tinggi,* like that of the *rapat besar,* was based on article 279 of the criminal code (K.U.H.P.) concerning marriages in which it is known by the partners that an earlier marriage has not been validly dissolved. Adat crimes may be prosecuted only by analogy with apposite articles of the criminal code. There were many complications in this case that are unnecessary to report here, except that the first husband claimed he had not been informed of the divorce, which is possible because he had left his wife for a time; that the accused couple had married in another village, knowing undoubtedly that the *chotib* in their own village might have disallowed the marriage; and that the *chotib* who did marry them did not investigate their previous marital states, which is supposed to be done but frequently is not. The data on this case were found in a massive file in the Bureau of Religious Justice.

[38] See the Djakarta daily *Abadi* (Masjumi), Dec. 12, 1953, and Hamzah, "Kedudukan Peradilan Agama di Sumatera."

western coast of South Sumatra. Like many modernist Islamic intellectuals, Hazairin regarded the religious courts with disdain, the more so as they were little drawn to modernist legal ideas.[39] But in addition, being in the Ministry of Justice and having earlier served as minister, it may well be that he was influenced by the competitive posture of the ministry vis-à-vis the Ministry of Religion.

But Hazairin was not the only active member of the Ministry of Justice in this struggle. The future of Islamic courts in South Sumatra was also thrown into question by some subtle maneuvering of the Ministry of Justice in 1955, when it sought to transfer the *Pamong Pradja*'s supervisory functions over adat courts directly to the *rapat tinggi* in Palembang and to the *pengadilan negeri* in the area of Bengkulu. This meant that the religious functions of adat courts would also be transferred to the supervisory control of the *rapat tinggi* and the *pengadilan negeri.* Bureau of Religious Justice officials feared that it would be extremely difficult to tear Islamic functions of the adat courts away from the civil courts when the former were finally abolished. Consequently they not only opposed transferring *Pamong Pradja* authority over the adat courts to the *rapat tinggi* and *pengadilan negeri,* but also opposed abolition of the adat courts in South Sumatra pending new general enabling legislation for the establishment of Islamic courts in the province.[40] Nevertheless, the Ministry of Justice's proposal succeeded—a minor victory over the *Pamong Pradja* as well as the Ministry of Religion —and the Bureau of Religious Justice had to live with it for a short while.

[39] Hazairin had been resident of Bengkulu during the revolution, at which time he had tried to reorganize and improve the quality of religious officials in the area, partly by requiring examinations for them. He vested control over these officials in the *Pamong Pradja.* Moreover, he felt strongly that religious courts should have no jurisdiction over inheritance; reflecting his training in adat law during the 1930s, he regarded inheritance as purely a matter of adat law. Ministry of Religion officials were greatly upset by his statement.

[40] The Justice proposal was made to the Cabinet in March 1955, under Minister of Justice Djody Gondokusumo, whom Religion officials deeply suspected for his basically anti-Islamic views. The Minister of Religion saw the proposal as a Cabinet member and sent it to the Bureau of Religious Justice for comment. The Justice proposal was based on the consideration that while the *rapat tinggi* and *pengadilan negeri* had exercised control over adat courts under martial law regulations from 1948 on, when martial law was lifted in 1953 this authority returned to the resident.

By 1956 this chess game had produced some remarkable legal combinations, including a sheaf of draft regulations on Islamic courts which the Ministry of Religion intended to propose for each of the major islands outside of Java. As a result of pressure from Atjeh the first one was approved for that area (P.P. 22/1957). But by this time the political situation had changed in a way that momentarily favored Islam. In late 1956 and 1957 regional dissidence and the threat of open rebellion, which finally broke out in early 1958, made concessions to the outer islands and to Islam more likely. In October 1957 a new government regulation (P.P. 45/1957) finally provided for the formation of Mahkamah Sjariah outside of Java and Madura. It was based on the regulation for Atjeh (now rescinded), which in turn was modeled after the Mahkamah Sjariah in East Sumatra. The regulation applied everywhere in the outer islands except for that part of South Kalimantan where religious courts were ordered by regulations of 1937 (S. 1937 no. 638).

Regulation P.P. 45/1957 represented what seemed to be a major victory for Islam, for there now existed a basis in law for religious courts all over Indonesia. The problems of the Islamic judiciary outside of Java had by no means ended, however. Apart from continuing resistance by civil courts and agencies, there were other practical difficulties. For one thing, the new courts provided for in 1957 could not be established quickly, despite frequent local demands for them, demands that grew from both functional need and a sense of Islamic due. Security problems, communications deficiencies, lack of personnel, and inadequate budgetary support prevented rapid progress. By 1959, in fact, only 55 percent of projected Islamic courts in the outer islands were actually opened.[41] Until they were, local KUA continued to administer the judicial needs of Islamic communities. But during the next ten years most *kabupaten* were provided with religious courts.

Another kind of problem resulted from limitations in the law of 1957 itself. As in Java, Islamic courts were to exist only where there were also *pengadilan negeri*, at the *kabupaten* level, but there were many demands to set them up in places where civil courts did not yet exist or were not even planned by the Ministry of Justice. Solutions to this difficulty were generally

[41] Memorandum from K. H. Musta'in, then head of the Office of Religious Justice, to the Secretary-General of the Ministry of Religion, March 27, 1959. Mimeographed.

ad hoc. For example, sometime in 1958 the local military administration (under martial law) in Kotabumi, north Lampong, established an Islamic court on its own authority, either because the local commander was sympathetic to Islamic demands or because he felt the move would be politically wise.[42] Later the Directorate of Religious Justice sought legally valid bases for such branch courts. Failing legality, however, they continued to operate anyway, as long as they were not seriously challenged. Otherwise, local religious offices simply performed the functions of courts, especially where a trek to an Islamic court might take a long time.

Along with the first instance Mahkamah Sjariah, new Islamic appeals courts (Mahkamah Sjariah Propinsi) were also established in the outer islands, though it took years before all of them actually had staff and were in operation. These appellate instances were modeled after the Mahkamah Islam Tinggi in Java, and the provisions of the law of 1882 as amended in 1937 were applied to them. The last colonial reorganizations of Islamic courts were generally influential in the new legislation.

The divergent histories of the Islamic judiciaries of Java and the other islands nevertheless left different imprints. On the surface the major difference involves formal competence. While Islamic courts everywhere shared competence in matters of matrimonial law, the Mahkamah Sjariah in the outer islands also had jurisdiction over custody and support of children (*hadhanah*), *wakaf*, *baitulmal*, charity (*sedakah*), inheritance, and gifts from heritable estates (*hibbah*). In reality, however, there are serious limitations on this only apparently extensive competence of the Islamic courts outside of Java. These limitations will be discussed in the next chapter. Yet, though differences in competence between the religious courts of Java and elsewhere are actually slight, their existence on paper was the basic reason why the Ministry of Religion did not propose a single regulation for the entire Islamic judiciary in Indonesia. Opposition to transferring inheritance (particularly) back to the Islamic courts in Java would be too great, and the Ministry of Religion and Islamic political groups were unwilling to relinquish the greater jurisdiction of outer-island religious courts merely for the sake of uniformity. For the Eight Year Plan of 1961, the Ministry of

[42] Ibid.

Religion did submit a program for the eventual unification of the entire religious judiciary. But these vague plans got no further than the Eight Year Plan itself, a grandiose statement that was less a plan than a declaration of hopes. Other kinds of differences between the Islamic courts of Java and those of the outer islands—due to cultural environment, level of Islamic intensity, institutional novelty of the courts outside of Java—while not unimportant, tend to be rendered less impressive by the generally subordinate place of the judicature in Islamic administration.

What all Islamic courts, old and new, had in common was more significant. On the one hand, they shared religious legitimacy, which transcended mere statutory legitimacy for many of their clients. On the other hand, they also shared a distinct subordination of their powers to civil judicial institutions. While the Islamic judiciary expanded more or less uniformly throughout Indonesia, against considerable resistance, this expansion was confined to a pattern established long before in Java, which nationalist leaders would not permit to be altered in the independent state. The Islamic courts nowhere had independent powers of execution. Contested decisions had to be brought to the *pengadilan negeri* for executory decrees, allowing civil courts to raise questions of proper procedure and to offer litigants adat alternatives to Islamic law. As before, then, the Islamic judiciary, though now territorially farther flung, remained hemmed in by civil state institutions controlled, by and large, by a traditionally unsympathetic bureaucratic elite.

Beyond this, the emergence of a uniform Islamic judiciary outside of Java had another kind of social and political significance. As in Java itself, gradually in the decades following the reform of 1882 and undoubtedly more quickly after Islamic political parties had appeared, in the outer islands new Islamic courts represented an important modicum of Islamic liberation from adat authority. This liberation depended upon a decisive weakening of traditional local structures of authority, sometimes violently as in Atjeh and East Sumatra, sometimes more gradually as in South Sumatra, Kalimantan, parts of Sulawesi, and the Lesser Sunda islands. As traditional local authority disappeared, declined, or fragmented, the bits and pieces of it became separable. Some fell back to old adat leaders or their heirs, now garbed in new institutional symbols, others were picked up by

the national government, and Islamic groups took what they believed belonged to them. Both national and Islamic mobilizations, particularly during the revolution, were the keys to this process. The end result was sudden autonomy for institutions and functions which before had been combined more or less comfortably (or uncomfortably) under one authoritative roof.

What makes this the more remarkable is the existence of organized political support for the distinct kinds of institutions. Civil courts and religious courts, apart from their specialization of function, enjoy essentially different sources of legitimacy. This is an institutional reflection, in village and state, of Geertz's analysis of primordial challenges to the emergence of civic loyalties in new states.[43] Nevertheless, the use of such institutions as religious courts, organized nationally, may produce a kind of spill-over of loyalty to the state itself. Islamic courts are by no means perceived as belonging peculiarly to the Islamic community, utterly distinguished from the state. Through the Ministry of Religion, they tend to be understood popularly as a state institution, and the Islamic bureaucracy itself by and large takes this view. Between religious and civil institutions, in this case the courts, there is great tension. When the level of ideological conflict is high, this tension is linked to a wider arena of political and religious struggle. Otherwise, however, symbols of legitimacy tend to become mixed in the minds of most people, and the clientele of religious courts becomes a clientele of the state.

CENTRALIZATION

While the expansion of the Islamic judiciary in the outer islands has to be understood largely in a political context—that is, a "nationalization" of the Islamic struggle along with a more general integrative impulse in national politics and administration—the further centralization of the courts occurred in a bureaucratic context. Centralization here means increasing control from Djakarta over procedural and substantive aspects of the work of Islamic courts.

Concern for centralization of the Islamic judiciary was concentrated in the Directorate of Islamic Justice. The incentive for further centralization grew from both national integrative urges

[43] Clifford Geertz, "The Integrative Revolution," in Geertz, ed., *Old Societies and New States* (Glencoe: Free Press, 1963).

and bureaucratic tendencies to administrative rationality and uniformity, not from Islamic doctrine. The condition of Islamic courts was a prod. Nearly everywhere the *pengadilan agama* lacked highly qualified judges. One result was constant procedural error, less in terms of Islamic law—which treats procedure very little—than of civil legislation dated from 1882 through 1957. At times these errors inconvenienced not only litigants but also civil courts and administrative agencies.[44] Islamic appeals courts provided little control or guidance. Outside of Java provincial Islamic appeals instances were often also staffed by inadequately trained judges. Although this was less true of the Mahkamah Islam Tinggi, which had a longer history and more prestige, it too was prone to frequent procedural error.

The existence of these conditions made it much easier to consider imposing greater national control over the Islamic judiciary than would have been the case had the courts been well staffed and prestigious. But overall the religious courts had never enjoyed high status, and there seemed little chance of acquiring it. Even within the national religious bureaucracy, though with significant local exceptions, Islamic judges were not highly regarded. Although centralization of control might not greatly improve the quality of judges, it could improve the quality of

[44] Sometimes, still, it is simply a matter of lack of care and thoroughness by the Islamic court that causes problems. For example, say a wife has committed adultery and is discovered, or is accused by her husband of committing adultery. While the husband may go to the public prosecution, the wife goes to the *pengadilan agama* and requests that she be divorced on grounds of mistreatment. In the *ta'lik-talak* marriage formula, divorce is automatically granted for reasons of desertion, mistreatment, and the like. Often the husband has in fact beaten his wife in these circumstances or otherwise provided sufficient cause for invoking the formula. As the Islamic courts work rather quickly in such cases, her divorce will usually have been completed before the prosecution can act and bring the husband's case to court. In the meantime, she may validly remarry, and the prosecution is at odds about what to do. The Directorate of Religious Justice, largely out of concern for unification and uniformity but also for control, made efforts almost from the start to require the lower Islamic courts to submit uniform case reports, statistics, and so on. This may have improved matters slightly, but clearly not enough. See, for example, Instruction of the Head of the Bureau of Religious Justice on forms to be used for case reports, divorce notices and reports, and so on, dated Nov. 30, 1954. Many similar instructions were sent to all Islamic courts. A considerable degree of uniformity has in fact been achieved in such administrative tasks throughout the Islamic judiciary.

justice and would certainly conduce to uniformity in the application of Islamic family law.

Pending the creation of a new national Islamic Supreme Court, which the Ministry of Religion opposed, or the formation of an Islamic chamber in the Mahkamah Agung (National Supreme Court), the most obvious national appeals resort was the Directorate of Religious Justice itself. In fact, occasionally litigants in the lower Islamic courts already requested help from the directorate in judicial problems. Originally, however, the relationship between the directorate and the Islamic judiciary was primarily administrative. Judges sometimes informally asked for advice on procedural or substantive legal problems from the staff in Djakarta. Yet the courts were somewhat jealous of their independence, conceiving themselves to be essentially related to local Islamic communities despite their place in a national bureaucracy. And in the directorate secular legal forms and doctrines had enough influence to inhibit direct interference with judicial functions, though they did not prevent it entirely. The lack of substantive functional control by the directorate over Islamic courts, for example, was carefully explained as a matter of separation between administrative and judicial powers.[45] Without useful guidance from Islamic tradition, Islamic institutional innovations (as in the case of the Ministry of Religion itself) freely adopted the prestigious experience and lore of the "secular" state.[46] Nevertheless, from the start administrative functions of the directorate had judicial overtones, in both secular and Islamic terms. Its staff, which included Islamic legal experts, examined *pengadilan agama* decisions to make certain that no great

[45] Z. A. Noeh, "Ichtisar tentang Djawatan Peradilan Agama" [A summary view of the Office of Religious Justice], *Penuntum* (an internal journal of the Ministry of Religion published by the Office of Religious Information) 14, nos. 5 and 6 (May-June 1960): 3–6, 27. This is a valuable discussion of the directorate by the man who became, for all intents and purposes, its permanent secretary.

[46] On occasion the directorate and others in the Islamic bureaucracy proposed that observation tours be made to such countries as Egypt, Turkey, Saudi Arabia, Iraq, and Pakistan to collect material on religious law and justice. This was suggested by K. H. Musta'in, Head of the Directorate of Religious Justice, in his memorandum reviewing the affairs of the office for the secretary-general, March 27, 1959. But to my knowledge this was never seriously undertaken. Nor would the foreign example have been much help, for Indonesian Islamic developments had in many ways gone beyond those in other Islamic countries, and the political circumstances of Indonesia are of course quite different.

variety existed among them on substantive issues. (It also provided advice on Islamic legal problems, both to the ministry and, when infrequently requested, to other government offices.) A card index of Islamic jurisprudence was also more or less maintained, or at least considered desirable.[47] During the 1950s the directorate relied to a certain extent upon the Mahkamah Islam Tinggi (MIT) for advisory opinions (*fatwa*) on problems of Islamic law—for example, dietary rules—and for consideration of other matters which involved the Islamic judiciary throughout Indonesia.[48] But this relationship atrophied, partly because the MIT was located in Solo (Central Java), and possibly, too, because the leadership of the MIT had simply proved inadequate. Living a rather quiet existence, the MIT concerned itself almost entirely with review of *pengadilan agama* decisions on divorce problems and the like. Far from the center of policy-making activity, with only intermittent access to detailed information about national Islamic legal and judicial affairs, it could not consistently play the kind of role which the directorate itself came to play. Moreover, as its jurisdiction was confined to Java, the MIT could offer little guidance for the Islamic judiciary in the other islands.

In 1963—again, at a time when Guided Democracy gave centralized control and direction emphatic ideological support—the Directorate of Religious Justice was granted review powers over the whole of the Islamic judiciary. A decision of the Minister of Religion provided that, "The Head of the [Directorate of] Religious Justice is given authority to examine and determine whether or not a decision of a religious court, in the first or

[47] The directorate also made some effort to send noteworthy *pengadilan agama* decisions around to other courts for their information and example. In addition, its responsibilities included review of national legislation for conflicts with Islamic law and contact with the Ministry of Justice and other agencies with any relationship at all to problems of religious justice. See annual report of the head of the then Bureau of Religious Justice, H. Moehd. Djoenaidi, April 1955. Mimeographed.

[48] While Kafrawi was secretary-general of the Ministry of Religion, however, and Djunaidi was head of the directorate, perhaps because Djunaidi maintained close relations with the MIT, the latter was more often brought into affairs of the directorate than was the case later. The MIT was apparently also kept informed of efforts to establish religious courts outside of Java, and its advice may have been asked from time to time in that connection. But in general the MIT was not highly regarded.

second instance, fulfills the conditions and rules laid down by statute, and also to declare such a decision invalid." [49]

The immediate reason for this expansion of the directorate's functions and authority was a complex case in which the MIT committed a procedural error, hardly an unusual one, which neglected and compounded an error by a West Javanese *pengadilan agama*. But the case involved an upper-class family, and other civil offices also became concerned.[50] In addition, one of the parties in the litigation specifically asked the directorate to review the MIT decision, whereupon the directorate made the minister aware of the problem. Directorate officials had undoubtedly considered the possibility of assuming appellate functions before, and at least one important directorate leader stood strongly opposed to any such institutional interference with judicial functions. But for those, including the director himself,

[49] Pendjelasan atas Keputusan Menteri Agama R. I. no. 19, Tahun 1963 [Clarification of the Decision of the Minister of Religion no. 19, 1963], written by Z. A. Noeh, originally delivered at a conference of Islamic court chairmen in West Java on June 5, 1963, and then sent to all Islamic courts in December 1963 after a number of questions had been raised by religious judges. The date of the Ministerial Decision is February 2, 1963.

[50] As it was incompletely abstracted in the clarification of the Ministerial Decision—and further explained to me in the directorate, July 12, 1967, though my understanding of the facts remains inadequate—the case involved a divorce (*talak*) which the *pengadilan agama* validated on behalf of the wife. Before the two parties received notice of the decision, the husband indicated to the court that he wanted to appeal and paid the requisite costs. (The man may have decided to *rudjuk*—that is, reconcile with and take back—his wife, but she did not want to rejoin him.) The wife received the notice of valid divorce (*surat tanda tjerai*) even though the husband had appealed. This was in error because a notice of valid divorce should always be final; either the notice should not have been issued, or the appeal should not have been allowed. In addition, the ex-wife was not informed of the motion to appeal, and the documents were finally sent to the MIT only about six months later. Failure to inform the wife of the appeal, the delay, and other deficiencies, were in clear violation of procedural rules (S. 1937 no. 610). Finally the MIT sent back its decision about six months after it had received the case, reversing the decision of the lower court but ignoring the errors. This kind of procedural misfortune is frequent in the religious courts. Now, what apparently made this case so delicate is that the woman meanwhile was remarried to someone with European legal status. When the MIT quashed the first instance decision, she was suddenly in a polyandrous situation from the point of view of Islamic law. But she was now subject to European law, and so on in a remarkable mesh of complications. She evidently then requested the Directorate of Religious Justice to review the MIT decision and extract her from the morass.

who were so interested, this case was an opportune one for justifying the innovation.

When Islamic judges questioned the directorate's new powers, the change was justified by reference to colonial practice when the MIT was subject to control by the Department of Justice, whose authority in this respect was assumed to have passed to the Ministry of Religion. Officials denied that the directorate had thus become a court of cassation, any more than the colonial Department of Justice had been. But in effect that is precisely what it became. Review of *pengadilan agama* decisions could be requested by a litigant or undertaken by the directorate itself in a kind of *certiorari* action. And the powers of review might extend to both substantive and procedural issues:

> Whether the implementation of the Ministerial Decision will be limited only to statutory [procedural] requirements or will involve the subject matter of the religious courts' decisions, largely based on the Sjariah rules, will also be left to the discretion of the Head of the [Directorate of] Religious Justice. . . . For in essence the application of religious justice cannot be separated from consideration of the Sjariah rules and [the effort] to strengthen the application of the Sjariah rules as an element in the positive law of the Republic of Indonesia based on the rule of law.[51]

Although these powers have not yet been exercised frequently, they have been exercised enough for a procedure to begin evolving. Cases brought before the directorate are considered by a body consisting of the director or his second in command and the four section chiefs of the directorate. As of 1971 the directorate had apparently acted with care and concern for the sensitivities of Islamic judges, tending to avoid

[51] The Ministerial Decision was retroactive to Oct. 6, 1958, the date of a Ministerial Regulation (3/1958, amended by no. 15/1960) that reorganized all divisions of the Ministry of Religion and stipulated their formal functions. It was further indicated in the clarification that the decision would provide for legal needs during the period of "transition" pending the promulgation of new legislation—required by a decision of the Provisional People's Consultative Council (MPRS) and being drafted by the Ministry of Justice—according to which "religious justice would have the same level and stature as general justice, military justice, and administrative justice." The appeal to status concerns in the religious courts is significant.

direct consideration of substantive issues.[52] Yet the judicial authority of the directorate now exists and may be exercised more aggressively in time. Even those in the directorate who have most staunchly resisted accepting the new authority have finally been attracted by its availability and potential. Lower Islamic courts may resist this centralizing authority, but there is very little they can do about it. Not least important is the likelihood that litigants will increasingly take advantage of the highest appellate resort to contest local decisions. This is one more facet of the general challenge by the state to local authority. It is the more significant in that it is an Islamic development within the framework of a civil state.

Assuming that the directorate's appellate powers will eventually be put to habitual use, the effect will likely go beyond mere uniformization of Islamic family law. This will unquestionably be one concern of the directorate, as will control of procedural quality. But in addition a more subtle mixture of Islamic and national ideological symbols will probably be introduced into Islamic jurisprudence, along with a wide variety of influences from national politics, bureaucratic conflict, and central government goals. These must somehow mesh with the substantive law of Islam which the lower religious courts try to apply. It is impossible to tell what the net result may be, because this must depend upon the issues that most concern the directorate, and national Islamic political groups, in any given period of time. But it seems likely, at least, that one general result may be the further assimilation of the Islamic judiciary into the state. And it is possible that Islamic family law, which has resisted reformist pressure even more in Indonesia than in other Islamic countries, may be opened up to new influences from the back door of in-

[52] This is not meant to suggest that Islamic personal law is going to be changed by judicial action alone in Indonesia. This has happened nowhere in Islamic countries, for the holy character of the law and the lowly status of Islamic judges renders the judiciaries of Islam fundamentally conservative. Even a very liberal Directorate of Religious Justice is not likely to undertake an effort to alter the religious law basically. But should a legislative revision of marriage law finally come about in Indonesia, the directorate may prove critically important in guiding and pushing the lower courts to accept and implement the new rules. Short of this, however, the directorate may also prove a significant agent of change in bringing gradual shifts of legal view to the Islamic judiciary. There is enough flexibility in the Islamic law, and a plethora of models from other Islamic countries, to encourage this.

stitutional change within the now expanded Islamic judicial hierarchy itself. This depends, of course, on the receptivity of national Islamic bureaucrats to the liberalizing attitudes of Islamic intellectuals and other urban sources of new social ideas. But at all odds they are more open to such influence than local religious judges, and their views must naturally have a wider impact through the national jurisdiction which the Directorate of Religious Justice has acquired.

Two cases reviewed by the directorate that I have seen—there have been only about a half dozen in all from the time the authority was granted through 1971—show little of this sort of significant movement as yet, but they do offer hints of what may come in the future. The first case (no. 3/1966, dated November 1966) involved an inheritance issue from Gunungsitoli in the ethnic Batak area of North Sumatra, a region dominated by Protestantism but where many Muslims live also. On the decease of one Fataja Marundruri, three relatives asked the *pengadilan agama* to designate them as legitimate heirs and to indicate the proper division of the estate according to the *faraid'l* rules of Islamic law. The late Fataja and these three were all Muslims. The religious court did as they requested. Three other claimants, Christians, appealed this ruling to the Islamic appeals court in Medan, which upheld the lower court. The excluded claimants then appealed to the directorate—called by the appellants Mahkamah Sjariah Agung (Supreme Sjariah Court), which the directorate denied that it was—on grounds that they had been denied a share in the inheritance because they were Christians. By Sjariah rules they could be excluded, and the directorate refused to interfere with the subject matter of the lower-court rulings, in effect upholding them. But a short dictum was appended supporting the principle of freedom of religion, as indicated by the Pantjasila and by article 29 (2) of the constitution. The consequences of this principle, according to the directorate ruling, were that every man not only should obey the dictates of his religion but also should respect the legal obligations incumbent upon the religious beliefs of others. By implication this meant that Christians should respect the exclusion of Christians from inheritance in Islamic families according to Islamic law.[53] The decision was rendered at a time when hostility between

[53] The decision was signed by K. H. Achmad Zaini, head of the Directorate of Religious Justice. Mimeographed.

Islamic and Christian groups was on the rise, though it is by no means clear that relative peace among them would have changed the directorate's views in any way. What is more important, in the perspective of this discussion, is that the directorate went beyond the Sjariah to refer to symbols of the Indonesian state in justifying its decision.

The second case, which caused considerable excitement in the directorate, is significant for two reasons. First, it brought the most reluctant directorate officials around to using the review authority of the directorate. Second, a development in the case compelled the Mahkamah Agung to consider peripherally the directorate's review powers and, in effect, to leave them alone. It is unnecessary to describe the case in detail, but what was involved was an attempt by a woman to divorce one man in order to marry another. In 1965 the *pengadilan agama* of Bogor (West Java) granted the woman a divorce on grounds of cruelty, but the Mahkamah Islam Tinggi quashed the decision for lack of evidence on critical points of issue. The woman thereupon went back to the *pengadilan agama* and sued for divorce on grounds of desertion. Her husband, very much opposed to the divorce, did not attend the session, for he had not been informed of the session in time. The court granted the divorce, and this time the MIT approved the decision. On the basis of this appeal decision, the woman married the other man.

By this time a remarkable number of procedural errors had been committed by both the *pengadilan agama* and the MIT. Most important, the lower court should not have tried the second case, and the MIT should not have accepted the appeal, because, among other significant reasons, the first husband was not kept properly informed of the entire process. When he discovered that his wife had married the other man, the first husband went to the public prosecution to accuse her of immoral acts, arguing that the second decision of the lower court, and its approval by the MIT, were incorrect and therefore null. (Property problems formed part of the background to the case and help to explain its complexity.) He also appealed to the Directorate of Religious Justice for help. In 1967, after considering the facts of the entire case, the directorate felt compelled to interfere and issued a decision (no. 1/1967) quashing the second lower court and MIT decisions and ordering the *pengadilan agama* of Bogor to reconsider the status of the woman's marriage. The lower court did

so, annulling the second marriage and restoring the first marriage. But the woman and her second husband ignored the decision. So the first husband went to the local *pengadilan negeri* with a request that the most recent decision of the *pengadilan agama* be upheld and executed. The lower civil court agreed, but on appeal the *pengadilan tinggi* (appellate instance) of West Java quashed the decision on procedural grounds. Naturally the first husband appealed to the Supreme Court.

The Mahkamah Agung took considerable time on the case, recognizing the complexity of the issues before it. The key issue was whether the directorate's assumption of judicial authority was legitimate, for it was on the basis of the directorate's decision that the *pengadilan agama* had nullified the second marriage and restored the first, execution of which decision was at issue in the civil court process. At this point the case becomes even more complicated, because finally the Mahkamah Agung stated that there was no basis in law for the directorate's judicial powers, that, indeed, the assumption of such powers by an executive body is in conflict with the constitution. However, the Supreme Court also recognized, in effect, that the exercise of judicial powers by an executive body in this situation—during the colonial period and, by implication, now—was a matter of executive discretion (*kebidjaksanaan*). Consequently, the court decided only upon the immediate issue before it in cassation, upholding the *pengadilan tinggi*'s decision but refusing to interfere further with any of the Islamic judicial instances involved. This may have left the original litigants in a legal quandary, and the Supreme Court's dicta should not be overly encouraging to the directorate, but basically the court let the directorate be.[54]

[54] The Supreme Court decision, no. 594 K/Sip/1970, is dated June 12, 1971. I am grateful to the Directorate of Religious Justice for permitting me to examine the file of documents on this case, and to Judge Bustanul Arifin of the Supreme Court for discussing some aspects of it with me in early October 1971. In the view of directorate officials, the main significance of the Supreme Court's decision was that, despite its comments on the legality of the directorate's powers, it nevertheless discreetly skirted the problem of doing anything about it. In future, however, the decision may yet cause the directorate difficulties in a more general consideration of the organization and powers of the religious judiciary.

CHAPTER FOUR

Islamic Courts: Recruitment, Organization, Procedure

ISLAMIC COURTS EMERGED FROM THE REVOLUTION DIFferent from before in certain respects. As an institution the religious judiciary went through a brief evolutionary spurt that left a recognizable imprint, but without basically changing its character or limits. This was not true of civil courts. A lawyer from the colony could see bits and pieces of the *landraad* in the *pengadilan negeri*, but he would (as many Indonesian lawyers do) understand the *pengadilan negeri* as an essentially different kind of first instance court from the *landraad*. But the *pengadilan agama* would (and does) strike him as pretty much the same as before, existing now everywhere and operating rather more uniformly, but evoking the same sort of derision.

At the level of first instance religious courts, the changes that did occur were anticipated by the debates of the 1930s. The unfulfilled promise of the colonial government to pay salaries to religious judges was now carried out. The purpose of this reform, as it was originally conceived in the 1920s and 1930s, was to eliminate corruption among Islamic judges. But by the time of independence other organizational changes had a greater impact on corruption in the courts than salaries. Most important was the policy of the Ministry of Religion with re-

spect to registration of marriage, divorce, and reconciliation. This was now firmly established in administrative offices controlled by the Kantor Urusan Agama. Islamic courts no longer had anything to do with all this that was not litigational, except for problems of validation where records did not exist. Consequently the opportunities for corruption, though they did not disappear in the courts, were greatly reduced. Paying salaries to judges did have another significant effect, however, which was to turn religious judges clearly and recognizably into civil servants. Their traditional status as adjunct to local aristocratic bureaucracies faded rapidly. Their absorption into the Ministry of Religion, under the Directorate of Religious Justice, carried this transformation further.

In addition, Islamic judges became functionally more specialized, as did the entire religious bureaucracy. This process of specialization accompanied the growing autonomy of religious institutions, which freed them from control by traditional local authority—though not entirely from control by the civil institutions of the new state. As the administrative links between Islamic community and non-Islamic authority were shorn, at the same time the functions of Islamic administration were redistributed and redefined.[1] Traditionally the Islamic judge was usually a penghulu, a mosque administrator who assumed other responsibilities as well within the Islamic community. Now these functions were separated, and the judge became a judge and, usually, little else. If anything, the religious judge probably was weakened socially by this sharper definition of his role, and it most likely narrowed his judicial influence too. This is an impressionistic view, however, and deserves further research.

Nevertheless, to the casual observer, even a lawyer, most of these developments are barely apparent. Islamic courts seem to operate much as they always have, despite everything that has happened to them collectively as a judicial institution. The religious base of the courts is partly responsible for the lack of essential change; as Maine pointed out long ago, religious legal institutions tend to rigidity, for obvious reasons. But this

[1] As nationalist leaders had proposed subtly in the 1930s, and again (by Supomo) during the occupation more explicitly, Islamic advisers to the *bupatis* were removed. Islamic advisers in the civil courts (*pengadilan negeri*), usually Islamic judges, were also eliminated in principle. Now the penghulu in the *pengadilan negeri* does little more than swear in Muslim witnesses.

necessarily applies much less to aspects of religious institutions that are not closely bound up with holy doctrine. In the case of Islamic courts this takes in a great deal of territory unrelated to substantive law. Although Islamic legal doctrine prescribes strict rules for the organization and procedure of Islamic courts, local tradition and convention are very influential. The fact is, of course, that the Indonesian Islamic judiciary did undergo significant change, none of it either justified or opposed on grounds of religious imperatives. But limits were quickly reached in the courts themselves, in contrast with the Islamic judiciary as a whole, which, as we have seen, was expanded and centralized fairly rapidly after the revolution. One major reason for these narrow limits has been the pattern of recruitment to the Islamic bench, a pattern connected with other political and intellectual problems of Indonesian Islam that will be taken up in the last chapter.

In this chapter recruitment will be discussed, along with the organization and procedural problems of Islamic courts today.

RECRUITMENT

In the traditional texts of Islamic law the qualifications demanded of a *kadi* were strict, but they were seldom fulfilled beyond the rule that the judge be a mature male Muslim.[2] Honor, honesty, and superb knowledge of legal principles were too much to expect from judges whose independence was always severely limited by executive authority and whose jurisdiction was in any case restricted to matters of family relations and religious foundations. Consequently the *kadi*-ship never became a very high calling, and poor judges simply bred more poor judges.

In Indonesia the low standards of Islamic judicial personnel have also resulted basically from two kinds of problems: on the one hand, low prestige and educational inadequacy, and on the other, political-ideological conflict within Islam that makes the stakes involved in recruitment patterns very high.

Indonesian Islamic courts have been plagued by inadequate prestige and educational qualifications throughout their history.

[2] On the qualifications of the *kadi* in Islamic legal tradition, see Reuben Levy, *The Social Structure of Islam* (Cambridge: University Press, 1962), pp. 339–340.

It was always recognized that Islamic judges were badly educated by any standards. Islamic legal education had never, as Snouck pointed out, been paid much attention. This showed up in the lack of Indonesian Islamic scholarly activity, until the modernist movement gave rise to a new challenging scholarship, essentially unacceptable to the traditional Islamic bureaucracy, and the colonial law school began to produce scholars similarly inclined. Even the legal commentaries used in Islamic courts were commentaries on commentaries.[3] If anything, the occupation and revolution, by throwing up all sorts of new "ulamas" who took positions in the courts and remained there, made matters worse. During the early years of independence it was enough simply to have Islamic courts in existence for bargaining purposes, but soon the problem of quality became hard to avoid if the religious judiciary was to move ahead in the new state. When religious leaders regarded the standards of civil judges, the matter appeared to be extremely discouraging.

> Hadji Djunaedi [former PA chairman and an Islamic scholar in his own right] said over and over again that nothing could be hoped for from the Islamic courts until Islamic universities begin to turn out well-trained judicial candidates. He said that in all Java there are no more than eight or so capable Islamic judges [on approximately eighty-eight courts]. In these conditions it is silly to try to improve the position of religious courts. We must educate. [Nov. 2, 1960]
>
> Hamid [penghulu in the Directorate of Religious Justice] reviews Islamic court decisions, and among them, he complained, there are many in which the judge simply hasn't known what the law is and how to interpret it. [This was mainly with respect to Islamic courts outside of Java.] A recent case from Palembang caused him particular consternation concerning the

[3] That is, the original writings of ash-Sjafi'i and his principal commentators were rarely read or used. The digests of Sjafi'ite doctrine usually taught in religious schools and used in the courts were the *Nihaya* by al-Ramli and the *Tuhfa* by al-Haitami, both dating from the sixteenth century. See Deliar Noer, "The Rise and Development of the Modernist Muslim Movement in Indonesia during the Dutch Colonial Period (1900–1942)" (Ph.D. diss., Cornell University, 1963) p. 11; also Th. W. Juynboll, *Handleiding tot de Kennis van de Mohammedaansche Wet*, 1st ed. (Leiden: Brill, 1903), p. 31. Both texts are commentaries on the law book of Nawawi (thirteenth century), *Minhadj al-Talibin*. Noer notes, p. 17, that in Minangkabau the *faraid'l* rules of inheritance were seldom taught because of their unpopularity with adat leaders.

> incapacity of the judge. This, he said, is the essential issue of the religious courts. There are now so few well-trained judges as to be insignificant. The religious judges required now should be broadly trained men, knowledgeable generally in state law as well as Islamic law. . . . [Nov. 2, 1960]

For Islamic party leaders who hoped, however vaguely, for the eventual emergence of some kind of Islamic state, upgrading existing religious institutions was also a primary concern, though little was done about it.

> [National Masjumi leader] argued that colonial policy had resulted in a very poorly qualified corps of religious judges. They were neglected and usually had poor education even in religious law, let alone civil law. . . . During and after the revolution it was the intent of Islamic political leaders to change this situation. Although no statement was made to this effect—partly so that the ultimate intent would not be known—Masjumi wanted to emphasize the improvement of religious officials generally. While defending the distinct and separate position of the religious courts, the intention was to develop gradually a corps of well-trained judges, say, who would be able to serve as civil as well as religious judges. Gradually the religious and civil courts would be brought closer and closer together, until the time came when . . . they would merge. The assumption was, he made clear, that by the time this happened, the general legal [read political] situation in the country would be one in which Islamic law was in a course of ascendancy. [Dec. 23, 1960]

Such dreams rested on the uncomplicated analysis that Islam was in fact growing stronger in all ways, a notion that had received a shocking blow when Masjumi itself was abolished in late 1960. It was the kind of notion that encouraged political leaders to put off any realistic consideration of the difficult problems of Islamic law and institutional change, because the resulting arguments might have divided Islam and given advantage to the opposition.

From the beginning, however, the Ministry of Religion and particularly the Directorate of Religious Justice tried to correct the most obvious deficiencies. Several directorate leaders and their advisers set high goals, wanting not merely to improve the quality of Islamic judges but to give them the sort of training that would eventually make Islamic justice as good as civil justice and with as much stature. In fact, civil justice and legal training

were influential models for Islamic justice leaders. But the effort was doomed almost from the start. Islamic secondary schools (*pesantren* and *madrasah*) normally offered studies in Islamic law, but the schools and studies both were inadequate to professional needs—all the more so if the goal was to achieve standards common in the civil judiciary.[4] Consequently, in the new Islamic universities established shortly after the revolution by the Ministry of Religion and, later, in the State Institutes of Islamic Studies (Institut Agama Islam Negeri: IAIN) provision was specifically made for Islamic legal studies supplemented by introductory courses in civil law.[5] The thinking of Islamic officials with respect to religious universities was inspired by the same anxieties and goals that had influenced policy on other Islamic institutions after the revolution. While hoping to achieve parity of training with state universities, they did not want to submit to those universities. Islamic academies were to be created anew: distinct, autonomous within the national educational system, and free of control by educational leaders who were suspected (often quite rightly) of wanting to confine and influence Islam. Thus the Ministry of Religion was responsible for creating a separate faculty of Islamic studies at Gadjah Mada University in Jogjakarta in the early 1950s. When the rest of the university opposed the Islamic faculty's autonomy, the matter was taken to the Cabinet, and eventually Islamic groups won a new and independent university, followed by several others. Independence, however, was at the sacrifice of other educational advantages, particularly the general education that Islamic leaders were themselves often convinced religious officials needed.

It was hoped that well-qualified judicial trainees would come out of these schools. Had this effort been successful, graduates of the Islamic law faculties might have formed a new breed of religious judge, for the teachers in many of these schools

[4] Standards in the civil judiciary also declined radically during the Japanese occupation and afterward, but they remained incomparably higher than in the Islamic courts. What is more important, they enjoyed an aura of prestige and excellence, inherited from the past and based on the principle of high educational qualifications of civil judges, which the Islamic courts could not match at all.

[5] On Islamic education in Indonesia, both lower and higher, see Mahmud Junus, *Sedjarah Pendidikan Islam di Indonesia* (Djakarta: Pustaka Mahmudiah, 1960).

were distinctly modernist; indeed, it was out of the modernist tradition, and from the Muhammadijah schools, that Islamic university teachers had to come. Teachers and occasional lecturers were also imported from Egypt for a time. But little came of the Islamic law programs. Few students matriculated; by late 1960 there were only five students in the law faculty of the Islamic university in Jogjakarta. In the following years not many more have been attracted, either in Jogjakarta or elsewhere. And for those who graduated and did not take jobs in the university, few judicial posts were waiting.

The reasons are fairly clear, and they illustrate the plight of subordinate legal institutions in a plural legal system. Both the Islamic universities and Islamic courts lack prestige. The best students consistently choose the most prestigious universities—the University of Indonesia, Gadjah Mada, Padjadjaran (Bandung) in that order, followed by a number of others recently established—all of them state universities. Only if they are not admitted to these schools will devout Muslim students then consider Islamic universities. There are a few exceptions who want to study at Islamic universities from the start, but not many it seems. Moreover, Islamic law faculties, an essentially new idea, are the least likely to attract students, and not at all likely to attract ambitious students. Muslim students usually lean either toward commerce—the largest Islamic student organization, Himpunan Mahasiswa Indonesia (HMI), is the strongest organization in the economics faculties of most major state universities—or toward traditional studies in Islamic religion and Arabic literature. Few are enthused by the arduous and dull work entailed in the reading of endlessly repetitive volumes of legal interpretation. Especially for the philosophically inclined Javanese Muslim, if he has escaped the years of memorizing Koranic phrases usual in traditional *pesantrens*, legal studies do not offer much.

Graduates of the Islamic universities, moreover, whatever their fields, are not at all likely to turn down job offers from just about any part of the national bureaucracy other than religion. Especially for young men whose hearts are set on becoming *prijaji* officials, the Ministry of Religion is not the place to be, unless of course nothing else is available. Many do end up in the Ministry of Religion, but it is not rare for them to leave when something better turns up. The determining variable here is

status, which the lower levels of the religious bureaucracy lack. It is something of a vicious circle.

Finally, the few Islamic university graduates who are interested in becoming religious judges usually find that they are still not sufficiently qualified. When it comes to considering the appointment of such candidates to religious courts, it appears that they do not know Arabic well enough, and sometimes barely at all. There is also some concern that young men will not have quite enough social authority to replace older Islamic judges. And there are other difficulties. Most older Islamic judges without recognized academic degrees must be given relatively low civil service rank, a matter which aroused considerable complaint in the 1950s. A young man with a degree appointed to a judgeship would have to be given a higher rank and salary than older judges without more than a *madrasah* education. The judges' resentment has been too great for the ministry to overcome. These older judges, moreover, who in bulk carry some influence in the ministry, have had the advantage of experience, local familiarity, and traditional prestige. Over 50 percent of them (in 1968) had been to Mecca sometime after having studied in the *pondok* (first school) and *pesantren*.[6] What they lacked in modern state skills, status, and knowledge, they made up for, more or less, in traditional Islamic skills and status. Many older judges are also men with local political influence, and local religious leaders have the inside track on Islamic patronage for the foreseeable future. Their collective influence is predicated on the dominating position of the Nahdatul Ulama in the Ministry of Religion and generally in the religious bureaucracy. So long as the NU remains in control of the ministry, older Islamic judges are not likely to suffer from too much pressure, nor is there likely to be a remarkable infusion of new judicial blood, even if it can be found, for this would not serve either the doctrinal or political interests of the party and its traditionalist elite.

It is this set of relationships that ultimately makes fundamental change in the patterns of recruitment to the Islamic

[6] Like much else in our discussion of recruitment, this information, for which there is no documentary support that I know of, comes from interviews with officials in the Directorate of Religious Justice. Impressionistically, however, my interviews with Islamic judges seem to confirm their estimate of the large number who have become judges after making the *hadj*.

judiciary almost insuperable. Minor deviations from the existing pattern are possible, even when they violate some of the oldest traditions of Sjafi'i doctrine. For example, the Directorate of Religious Justice has appointed women as members of Islamic courts; in 1964 there were fifteen women honorary judges and one full-fledged judge in the city of Tegal in north Central Java.[7] There was some protest about this from Islamic circles, but directorate leaders justified it on grounds that it was necessary in an emergency (i.e., lack of qualified Islamic judges) and, after all, the lack of full qualifications by many male judges was also a violation of Islamic law. But while appointment of women violates the law, it can be accomplished because it is clearly not an overwhelming threat to any essential interests. An effort to appoint large numbers of graduates from new Islamic universities, however, might very well presage a shift in doctrinal positions toward Islamic modernist ideas, some of which treat the law rather flexibly, and would of course have an effect on patronage.

But the matter is made doubly difficult by a basic lack of interest in the religious courts on the part of Islamic modernist intellectuals of nearly all intellectual tendencies. Even if the Ministry of Religion suddenly (or even gradually) decided to appoint non-NU or nontraditionalist judges, there would probably be only slight interest. Some Islamic intellectuals, indeed, would just as soon abolish the religious courts, which they regard not only as contemptible but also as an obstacle to legal integra-

[7] Interview with Director of Religious Justice Zabidi, Oct. 28, 1964. Zabidi strongly favored the appointment of women judges and made a considerable effort to convince opponents that it was all right. He appointed the first fully recognized woman judge to the court in Tegal because he himself came from this area and felt he could control the situation should protests occur. At about the same time the wife of a high *Pamong Pradja* official in Pekalongan, also north coast of Central Java, asked to become a religious judge, and it was agreed, as long as she would consent to wear proper headdress in the court, which is located on the grounds of the mosque. Whether she was actually appointed, however, I don't know. Nor do I have data at this time to indicate how many more women judges have joined the courts; it is doubtful that it has become a major trend. In the conversation with Director Zabidi, an Islamic judge from Padang, West Sumatra, was present, who said that it would be most difficult for the people of his area to accept a woman judge, as it undoubtedly would have been for this judge himself. Zabidi indicated that he had every intention of moving slowly even in Java on the issue.

tion in the country.[8] Others have an ambivalent enough view of the modern uses of Islamic law to have paid it little attention. Still others simply would not accept the lowly status that Islamic judgeships offer.

The same is true of still another possibility of improving Islamic judicial personnel—that is, to attract law graduates of the major state universities. This is of course even less acceptable to most members of the Islamic bureaucracy than drawing upon the products of new Islamic universities. But in addition, secular law students show very little interest in Islamic law or Islamic courts. In 1961 a questionnaire was distributed to 308 University of Indonesia law students, from first through fourth year, in which they were asked, *inter alia*, about their fields of interest and their career preferences. Only 26 (8.52 percent) expressed any interest at all in Islamic law.[9] Not a single respondent, however, indicated that he or she would want to become a religious judge, though this position was included in a list of possible choices. The status rewards of the Islamic courts are too meager, certainly for those who see themselves as members of an urban-based national elite, and the courts are symbols of a political or institutional ideology which many students, including Muslims, in the secular universities reject.

Still, there is a persistent pressure for the appointment of well-educated and trained religious judges, a pressure rooted in the rational-bureaucratic urges of the Directorate of Religious Justice. By late 1971 a total of twelve State Islamic Institute graduates had been placed as Islamic court and Islamic appeals court chairmen throughout Indonesia. It is not a large number. But given the suspicions of old-line ulamas, it is at least a minor breakthrough for the views of directorate leaders. To fully establish the merit principle, however, in the modern bureaucratic sense, will obviously require a change in the relationship between

[8] These views are particularly strong among civil court judges and advocates who are devout Muslims, but they are common too among many Islamic intellectuals from the old Masjumi following. Political leaders of Masjumi and related groups often took Islamic courts more seriously, however, and defended them as part of the Islamic cause.

[9] Approximately 71 percent of the students in this sample regarded themselves as Muslims. It is worth noting that even fewer law students expressed an interest in adat law: 18, or 5.90 percent. Neither field of law, both of which were so important to law students in the colony, offers much now to those who want to get ahead in the legal system.

the religious bureaucracy and the traditional leadership of the Nahdatul Ulama. As this is being written the possibility of such a change has been given a boost by the appointment of a new Minister of Religion, Professor Mukti Ali from the I.A.I.N. of Jogjakarta, a man particularly interested in problems of Islamic education. The implications of this appointment will be taken up in our concluding chapter.

PENGADILAN AGAMA: ORGANIZATION AND COMPETENCE

Where an institution is located and how imposing its quarters are usually say something about whom it serves and how its clientele is regarded by those with political and economic power. From this perspective alone, Islamic courts in Indonesia are lowly institutions, attesting to the generally low regard in which Islamic administrative functions are held by the state elite. One who travels through the major cities of the country will seldom notice the religious courts, or if he does, they will not impress him enough to wonder what they are. This is not true of civil courts, whose condition is hardly elegant but which normally stand out prominently and are surrounded by a good deal of bustle. You have to hunt for *pengadilan agama*, which are variously placed. Usually they are near the city mosque, occasionally but rarely on its grounds, or at least in the *kauman*, the devoutly Islamic quarter of a city. Sometimes, however, the court is located in an alley or on the second floor of a government building where other Islamic administrative offices are found.

With very few exceptions, religious courts are cramped and poorly furnished. One normally finds, even in the major city courts, only two tiny rooms or so, in one of which a small table covered with green felt serves as the judicial bench. In a crowded front room or a corridor, administrative staff receive and register people with business at the court. Archives barely exist, though there are usually a few books in Arabic on a shelf or perhaps some registration books or even packs of old decisions in a cupboard. Funds are too scarce for anything like elaborate decor, nor are most judges inclined enough toward research to require impressive libraries.

By statute Islamic courts should exist wherever there are first instance civil courts, for the reason that execution of religious court decisions depends upon *pengadilan negeri* authoriza-

tion. Most *kabupaten* in the country by now probably do have Islamic courts, except for overwhelmingly Christian areas.

Each court consists of a chairman and at least three (two outside of Java, except for South Kalimantan) and not more than eight associate judges, a clerk, and administrative staff.[10] Usually the courts are short on administrative personnel because of budgetary inadequacy. Although there is constant complaining about financial inability to hire more people, the staff most courts have seems to be enough for their purposes. Not being able to hire the staff to which a court is entitled is more often a problem of prestige and patronage rather than efficiency. Office machinery is another matter, but here the religious courts suffer along with most other parts of the national bureaucracy.

Valid sessions require at least three judges in attendance, including the chairman, and seldom do more than three attend any sitting. All judges are appointed by the Minister of Religion. But while the chairman receives a regular salary, member judges are paid per session. Apart from formal reasons for this arrangement, it helps spread patronage among deserving ulamas. However, the legal-doctrinal underpinning of the collegial organization of Islamic courts is ambiguous. It was instituted in 1882, but Snouck created a lasting discomfort by pointing out that the traditional Islamic court consisted of a single *kadi.* In Islamic legal theory judicial unicity may have been premised on the delegation of judicial authority from the governor, conceived always as a single ruler.[11] But there is some question whether the single-judge organization was necessarily sacrosanct. Though local arguments could be made against it—for example, member judges would be subservient to the more prestigious penghulu chairman—local evolution was possible, as Snouck must have realized. Snouck himself did not hesitate to propose another deviation from Islamic judicial tradition—the creation of an appeals instance.[12] As it happened, the collegial arrangement was maintained, not least of all because Islamic judges got used to it and preferred it, though it was qualified by an implied fiction that

[10] For a summary of Islamic court organization, along with the relevant statutory provisions, see Notosusanto, *Organisasi dan Jurisprudensi Peradilan Agama di Indonesia* (Jogjakarta: Jajasan Badan Penerbit Gadjah Mada, 1963), pp. 17–20 and appendixes.

[11] See Emile Tyan, *Histoire de l'Organisation Judiciare en Pays d'Islam* (Leiden: E. J. Brill, 1960), p. 108.

[12] Cf. ibid.

member judges were not really full judges, only advisers of a sort.[13] This ambiguity remains today, and it is the basis of some procedural variety. The statutes (1881, 1937, 1957) provide that in case of an equal division of opinion in the court, the voice of the chairman shall determine. While in many *pengadilan agama* this procedure is followed, with a careful discussion of the case by all three judges, often enough the chairman himself dominates the court and merely solicits the advice of member judges. Much depends upon the relative status of court chairmen and associate judges. If the latter, for example, have had long experience in Mecca and enjoy the prestige of having studied there with a well-known scholar, they may be treated with great respect by the chairman. But in general, as court chairmen tend to enjoy higher status than associate judges, and as the latter rotate in attendance, it is not difficult for a chairman to assert whatever prerogatives he chooses. Thus despite the statutory requirement of decisional participation by the associate judges, one can still find court chairmen who insist that they alone have the right to decide; like the traditional *kadi*, they call upon the others only for advice.

The clerk (*panitera*) of the Islamic court, like the clerk of the civil court, may play an extraordinarily important role. Indeed, it is worth suggesting that court clerks and administration generally have been paid too little attention in studies of judicial organization and procedure. In Indonesian Islamic courts, clerks not only frequently give advice to incoming litigants, they sometimes manage, along with civil court clerks, a kind of underground network of case-load distribution. It happens, for example, that when two such clerks know one another well, the civil court clerk will advise litigants with inheritance problems to ask the help of the religious court in order to avoid delay. The Islamic court clerk funnels these cases to the bench without difficulty. Apart from this sort of activity, however, the clerk is often the best-educated man in court, and his influence over the judges can be considerable.[14]

[13] Were the associate judges advisers only, without deliberative authority, this kind of organization might have been justified as a *concilium*, which Tyan points out as the only corrective to the principle of unicity (ibid.).

[14] In his attack on the Islamic courts of Egypt in the late 1890s, one of Mohammad Abduh's points was that court clerks had come to exercise more influence than the *kadi* themselves. As in Indonesia, in Egypt too the religious judges were poorly educated, knew little of Islamic legal

The personal jurisdiction of Islamic courts is restricted to Muslims. There is little doctrinal guidance or debate in Indonesia over the question of who is a Muslim. Notosusanto reports that the courts seem to take the view that whoever is commonly regarded as a Muslim, regards himself as a Muslim, and has expressed the confession of faith (There is no God but Allah, and Muhammad is his messenger) is a Muslim for the purposes of the courts' jurisdiction.[15] One major exception qualifies this jurisdiction, however, and it derives from colonial legal doctrine and enactments. Any Muslim who is subject to the civil code for Europeans cannot bring his case to a religious court. Thus Europeans, Chinese, or indigenous Indonesians with European law status, though they may be Muslims, are excepted from the jurisdiction of Islamic courts.

The substantive contentious jurisdiction of Islamic courts varies between Java and the outer islands, as has been pointed out earlier. In Java religious courts have jurisdiction over marital disputes, marriage, divorce, and reconciliation problems requiring the intercession of a judge, interpretation of marriage contracts, issues of bride-price, and financial maintenance of wives required from husbands. The same is true of the Islamic courts (Kerapatan Qadi) of South Kalimantan. Elsewhere outside of Java, however, according to Government Regulation 45/1957, the competence of Islamic courts was expanded to include, along with the above, inheritance, *wakaf*, gifts from heritable estates, matters concerning the *baitulmal*, religious charities, and other issues as well.

The reality of competence is different. For one thing, as will be shown later in our discussion of inheritance in Java, Javanese Islamic courts do in fact deal with inheritance problems. For another, in the outer islands most of the issues just mentioned, other than divorce actions and, less so, inheritance, are seldom brought before Islamic courts. P.P. 45/1957 is actually ambiguous on this score of competence and flagrantly imprecise and open-ended, largely as the result of a compromise between

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philosophy, and had never mastered the four schools of legal doctrine. Indeed, according to Abduh, there were some who could not count. See Muhd. Hasbi Ash-Shiddieqy, *Dasar-Dasar Kehakiman dalam Pemerintahan Islam* [The bases of the judiciary in Islamic government] (Djakarta: Bulan Bintang, 1955), p. 84.

[15] Notosusanto, *Organisasi*, pp. 27–30.

negotiators of the Ministries of Justice and Religion who drafted the regulation. It was a compromise, reflected in the wording of article 4 (1) and (2), which put old wine into a new bottle, placing Islamic courts at a continuing disadvantage that had to be accepted if the new regulation were to win approval. This was that Islamic courts would be competent in all the issues listed above to the extent that "according to the living law they are resolved according to the law of Islam." From the point of view of those opposed to the expansion of Islam and Islamic law, this turned out to be a very clever formulation. What it meant was that, as in colonial adat law theory, Islamic rules had to have been incorporated into the conventional law of society before they could be applied. The matter is complicated by the "living law" formula, which some Islamically inclined lawyers had hoped would offer an opening for Islam against traditional adat. But one has to read "living law" as being equal to adat law plus, in reality, the discretionary judgment of civil judges about what social rules remain in effect. Since little research is done anymore by anyone on what is happening to adat law, and since civil judges tend to be hostile to Islamic law and Islamic courts, consequently "living law" seldom appears to have incorporated much Islamic law. The upshot is that the competence of religious courts in the outer islands depends in considerable part on the willingness of people to bring other than divorce cases to them; even then they have to share this competence with civil courts, to which a litigant might go in the first instance or even after it appears that the judgment of the Islamic court will be unfavorable. The Supreme Court decision referred to earlier, which confirmed the authority of a *pengadilan negeri* in Makassar over an inheritance issue, merely reinforced this judisdictional situation. There was (and is) little that religious-justice officials could do about it, partly because there is no overwhelming popular support for expansion of the competence of religious courts.

Differences in jurisdiction between the Islamic courts of Java and the outer islands thus have a primarily symbolic interest, though it is more than that in a few localities such as Makasar and other major cities where Islam is particularly strong. But these exceptions may be important indicators. For the "symbolic" differences could become increasingly significant substantively if people were to use Islam as a stepping stone away

from traditional adat obligations.[16] This in turn depends at least partly upon the provision by civil justice of alternatives both to adat and to Islam. There is some evidence, particularly in the case of inheritance, that this is happening.[17]

APPELLATE COURTS: ORGANIZATION, COMPETENCE, AND INFLUENCE

Islamic appellate courts (Mahkamah Islam Tinggi and, outside of Java, Mahkamah Sjarijah Propinsi or Kerapatan Qadi Besar in South Kalimantan) are located in Solo, Banda Atjeh, Medan, Padang (or Bukittingi), Palembang, Bandjermasin, Makassar, and possibly have been or may be established in one or two other major provincial capitals. The Mahkamah Islam Tinggi holds the largest jurisdiction, over more than eighty *pengadilan agama* in all of Java and Madura. As it is the oldest appeals court and located closest to the center of power in Djakarta, it also exercises the lion's share of institutional influence, such as it is, at the Islamic appellate level. It should be held in mind that there is no national Islamic supreme court, though the Directorate of Religious Justice performs the administrative and, perhaps increasingly, the review functions of one.

Because Islamic appellate courts were essentially new institutions, without historical or doctrinal referents in Islamic tradition, some freedom of imagination was possible in their creation. Not much was actually exercised, however, the tendency being to imitate either the *pengadilan agama* model or that of civil appeals courts. Such was the case with the Mahkamah Islam Tinggi, set up in 1938, which established the pattern for the outer island appeals courts created in the 1950s. But the lack of traditional limits shows up here and there in the organization of appeals courts. For example, they do not suffer any ambiguity in the position of associate judges. Islamic appeals courts consist of a chairman, two member judges, and a number of substitute judges. The chairman and associate judges are all paid regular salaries, in contrast with the per-session payment of substitute judges, and all three participate equally in deciding issues before

[16] J. Prins, *Adat en Islamietische Plichtenleer in Indonesie* (The Hague and Bandung: van Hoeve, 1954), esp. pp. 23ff. and 33–34.

[17] Daniel S. Lev, "The Supreme Court and Adat Inheritance Law in Indonesia," *American Journal of Comparative Law* 11 (1962/2): 205.

the court. According to Notosusanto, the first clerk of the Mahkamah Islam Tinggi, it was felt that the responsibility of the court was too great for it to consist of a single judge.[18] From the beginning, then, the Mahkamah Islam Tinggi was unequivocally a collegial court, unlike the first instance Islamic courts. Except for the Kerapatan Qadi Besar of South Kalimantan, outer island appeals courts are organized similarly.

The formal relationship of appellate and first instance religious courts is limited to appeals. Appeals courts have no administrative responsibility over the lower courts, whose administrative control is undertaken partly by provincial supervisory offices of religious justice (Pengawas Peradilan Agama) and ultimately by the Directorate of Religious Justice. Appeals courts are responsible for resolving conflicts of jurisdiction between first instance Islamic courts, that is, which of two courts must assume jurisdiction in a dispute. Such contests are rare, however. The governing rule is that residence of the plantiff determines which court has jurisdiction. As the fare of Islamic courts is predominantly divorce actions in which the wife has been deserted and the whereabouts of her husband is unknown, contested jurisdiction seldom occurs.

Theoretically the substantive competence of appeals courts extends to the same subject matter as that of first instance Islamic courts. But in real terms it is more limited. The reason for this is the informal competence of lower courts, with which appeals courts have little or nothing to do. Particularly important is the extensive but extra-legal inheritance work of Javanese Islamic courts, which will be discussed two chapters hence. The Mahkamah Islam Tinggi is never called upon to deal with inheritance cases, because the *fatwa* (advisory opinion) of the *pengadilan agama* in such issues is not subject to appeal. An exception might be the fortuitous request for advice by an Islamic judge in Solo, where the MIT is located, or one who happened to be passing through. Outside of Java, there is a smaller spread between first and second instance Islamic courts in the subject matter of their real competence, but there too the informal work of the lower courts, frequently in connection with conciliation of inheritance or other issues, seldom or never comes under the purview of appellate courts.

[18] Notosusanto, *Organisasi*, p. 18.

Everywhere the appeals courts deal only with documents from the *pengadilan agama,* and almost never see or talk with litigants. They have the power to call witnesses, if necessary, but evidently do so only on the rarest occasions. The result is sometimes an excessive formalism on the part of Islamic appeals courts, not so much in the sense of a too rigid adherence to legal norms—far from it—but in a rather narrow and legalistic perception of the kinds of problems brought before first instance courts. The relationship between *pengadilan agama* and appeals courts tends to be remarkably distant, which reduces whatever institutional influence the higher courts might have on the development or merely the operation of the lower ones.

While appeals courts have basically limited influence over first instance courts, they also have distinctly limited influence over the administration of Islamic law and the making of national policy with respect to it. It is generally true in the history of Islamic legal institutions that courts have had essentially little influence over the law and legal policy. Islamic judges have usually understood that their role is to apply the religious law, not make it, obviously, and innovations that have occurred have been the result of decisions by political authorities. Yet Islamic judges in Indonesia came close to exercising a good deal of influence over legal policy in the 1930s, when they organized the Perhimpoenan Pengoeloe dan Pegawainja (PPDP). Although the PPDP was not favorably impressed by the Mahkamah Islam Tinggi at first, indeed deeply suspected it as a Dutch effort to buy off Islam, yet Islamic judicial leaders finally took it over. Had nothing else developed, the MIT might have assumed a dominating institutional position with respect to the administration of Indonesian Islamic law and legal institutions. As it happened, however, a great deal else did develop.

It has already been mentioned that the age and location of the Mahkamah Islam Tinggi has lent it a sense of primacy among Islamic appeals courts. But, although it receives more attention than the appeals courts in the outer islands, it has exercised little purchase on the Ministry of Religion even in matters of religious legal policy. If anything, its influence has steadily declined since the revolution.

One major reason for this declining influence was its move from Djakarta to Solo in early 1946, when the Dutch had begun to return to the capital. Solo was chosen partly because some

republican offices were there, close by the revolutionary capital in Jogjakarta, but mainly because the MIT chairman, Kijai Adnan, himself from Solo, could offer adequate quarters for the court there.[19] When the revolution ended, buildings were hard to find in Djakarta and the MIT judges and staff were evidently satisfied in Solo, so the court remained. The result was to keep the MIT comfortably away from the hustle and bustle of Djakarta, where, however, most of the power and authority to make decisions was firmly located. With the creation of the Bureau of Religious Justice in Djakarta, the MIT lost any chance that it might have had for assuming leadership over the institutional development of the Islamic judiciary. The PPDP had disappeared in the Japanese occupation, and without organization, far from Djakarta, Islamic judges could not bear enough weight consistently to make themselves felt on policy issues in the ministry, even if they were so inclined. Politically, the MIT by itself did not count for very much.

For a time in the 1950s the MIT nevertheless continued to be treated with some deference. Its judges were asked for advice on issues of judicial policy and for *fatwa* on problems of religious law, for example dietary rules, by the Ministry of Religion. Moh. Kafrawi, secretary-general of the Ministry of Religion until 1959, seems to have been particularly solicitous of the MIT's views. But by the 1960s the court was seldom asked for advice about anything, as the authority of the Directorate of Religious Justice grew and gradually displaced the MIT's extra-judicial functions. In part it was a matter of the MIT being too far away to keep in close touch. But in addition the more aggressive and *au courant* officials of the directorate simply moved far ahead of the MIT in developing new policy ideas. The MIT gradually drifted to the sleepy periphery of Islamic legal authority, making it possible for the directorate eventually to assert its own judicial prerogatives in the form of new powers of review. As was pointed out earlier, the MIT's lack of legal finesse, particularly with respect to procedural accuracy, further diminished its authority and contributed to the success of the directorate's coup.

As the MIT's influence withered, the luster of its staff also dulled, though it remains a fairly important rung on the ladder

[19] Kijai R. H. Mohamad Adnan, interview, Oct. 24, 1960.

of Islamic judicial officialdom. In the early years of the MIT, through about the mid-1950s, it attracted rising men as judges and, even more so, as clerks of court. The clerks were (and are) especially important because it was recognized from the beginning that the general lack of highly educated and qualified Islamic judges in Indonesia, men who could handle more or less complicated procedural innovations, made it necessary to supply the MIT with staff assistants who had had civil legal training. Originally, this may have reflected the desire of colonial officials to domesticate and co-opt the court. The highly educated clerks tended to be Islamically moderate. Much of the present administrative organization of the MIT, and borrowed elements of civil procedure, are the result of their influence. Their presence did in fact offer the MIT a chance to acquire greater prestige and whatever benefits might accrue from links with civil legal institutions. In any event, the first head clerk (*panitera*) of the MIT was Notosusanto, later a professor of law at Gadjah Mada University. In the early 1950s such men as Mr. Sunarjo (NU) and Mr. Muljatno (Masjumi), both of whom became cabinet ministers, the latter indeed Minister of Justice, served in the same position. But by the late 1950s, the Mahkamah Islam Tinggi staff rarely included names like these.

Judges on the MIT tend to come from well-known Islamic bureaucratic families in Central and East Java. The first head of the Bureau of Religious Justice, Djunaidi, established the policy of representing each of the three Javanese provinces on the court, with the chairman usually from Central Java. The point, apart from the politics of it, was to give the court adequate expertise in the major languages of its jurisdiction—Javanese, Sundanese (West Java), and Madurese—and the customs and peculiarities of each region.[20] But it sometimes happened, particularly in the 1960s, when the MIT was being paid decreasing attention, that the Sundanese place on the court was left vacant for lengthy periods. Among Javanese judges and administrative staff of the MIT, family connections are frequent. Often the son or other relative of a judge or clerk will join the court in some capacity.

A judgeship on the MIT, unlike Islamic appeals courts elsewhere as yet, is occasionally a steppingstone to higher positions in the Ministry of Religion, usually the Directorate of Religious

[20] The material in this paragraph comes from interviews at the Mahkamah Islam Tinggi on Sept. 1, 1960.

Justice. Several past directors have been either clerks or judges on the MIT. This recruitment relationship may very well continue, for it is a natural one within the Islamic judiciary. But it has not redounded to the benefit of the MIT in any remarkable way, apart from minor personal favors and the like. For in an institutional sense the MIT and the Directorate of Religious Justice are competitive. The advantages of administrative power and authority lie with the directorate in Djakarta, and it is likely to use them to strengthen its own leadership of the Indonesian Islamic judicial world. For its part, the Mahkamah Islam Tinggi, though it may long remain *primus inter pares* among the appeals courts, is unlikely to accumulate more authority than it now has.

PROCEDURE

In the next two chapters, on divorce and inheritance jurisdictions of the Islamic courts, specific attention will be paid to procedural matters where they are relevant. This part of our discussion will deal more generally with problems of procedure in order to describe the institutional character of the courts.

As in all judicial systems, the Islamic courts in Indonesia are only one part, a subsystem, of a larger administrative apparatus. Between the courts and the rest of this bureaucracy relations are frequently close, whether formally or informally, and there is a good deal of intermixture of roles and functions. While much of the work of the *pengadilan agama* is basically nonjudicial, or nonlitigational—for example, validation of marriages or determination of legitimacy where registration certificates were not issued or were lost—it is equally true that various parts of the administrative bureaucracy participate actively in the total judicial process. A particularly close relationship usually exists between religious courts and local Kantor Urusan Agama offices, which are responsible for registration of marriage, repudiation, and reconciliation and which people commonly call upon for advice in other religious matters. This kind of access provides administrative officials with the opportunity to try their hand at reconciling disputes, especially marital disputes, before they escalate toward the court. In addition, village religious officials, especially where Islam is strong, also serve the same function. At such administrative levels of judicial activity mediation is the essential modality. When a dispute breaks through this screen to a religious court, conciliation of one kind or an-

other remains a significant part of process but shares the stage, of course, with decisional resolution.

The graduation of a marital dispute to an Islamic court is not usually marked by a sudden and upsetting change of procedure and aura. This is quite unlike civil courts, where lower-class people in particular often face a kind of culture shock from the imposing formality and procedural rigor of civil judicial decorum, however much some judges try to avoid it. Generally the ambience of religious courts is distinctly "lower class," partly because their clientele is overwhelmingly poor but also because Islamic judges are drawn from social reaches that are comfortably familiar to most people of the villages and city *kampungs*. On rare occasion a fairly well-to-do, high status couple, or half a couple, will appear in court, perhaps with an advocate. But usually the people in court, mainly women, are obviously from the villages or urban lower classes. For most of them the Islamic court is seldom overwhelming. In appearance and procedure *pengadilan agama* are low key, more or less informal, and, if not altogether comfortable, at least not prepossessing.

Islamic court sessions are normally held at least twice a week for divorce cases, and many courts, particularly in Java, set aside another day for hearing inheritance cases. Because cases rarely drag on for more than a month, and the majority are settled in a single session or at most two or three, the courts do not suffer from inordinate backlogs. In this respect they are far better off than civil courts, which of course handle more variegated litigation. When the Islamic courts are not in session, administrative staff continue to register actions, compile statistics, and so on. In the past some courts have lent their premises on off days to local marriage-reconciliation boards, though there is no formal relationship between them; more will be said about reconciliation boards in the next chapter.

Issues before the Islamic courts can be broken down into four rough categories related to procedural style. One is problems of noncontentious jurisdiction—validation of a marriage, establishment of legitimacy, and so on—in which a *prima facie* case supported by proper witnesses is sufficient. A second category includes requests for the court's advice on how to distribute an inheritance according to the *faraid'l* rules of the Koran. Such requests are usually noncontentious, but implicit disputes are not rare. The third and fourth categories involve marital disputes,

the overwhelming fare of Islamic courts. It should be remembered that men may divorce their wives almost at will, so that they need no assistance in this respect from the Islamic court. In one category of marital case, the wife appears in court alone, asking for a divorce because her husband has deserted or requesting support from a delinquent husband. The other category is made up of contested actions, in which the husband also appears in court. For our purposes, the usefulness of this distinction has mainly to do with the perspective of Islamic judges and the ease with which the court disposes of its cases. Cases of the first type are settled quickly, by granting a divorce as long as the wife can show stipulated cause proved by appropriate witnesses (*saksi*). Cases of the second type take longer, evoke more interest by judges, and tend to bring a more complex judicial conciliatory role into play. The remainder of this discussion will deal only with marital cases.

Conduct of hearings is inquisitorial in form. The court chairman, flanked by two associate judges and a clerk, examines the litigant(s) and witnesses in order to establish facts. The clerk may or may not take minutes; sometimes the chairman himself will do so. Associate judges may address questions directly to the parties or, in some courts, ask the chief judge to pursue them. On points of law the chairman may turn to the associates for advice. But hearings are usually informal enough that an aggressive clerk will feel no compunction about asking a few questions himself. Litigants tend to be deferential to whoever is behind the bench. The language of the court is usually that of the region, except in such cosmopolitan centers as Djakarta, Medan, and a few others, where the mixture of population groups makes it necessary to use Indonesian. Records are often kept in the regional language.

A divorce case is normally opened with the ritualized request by a wife, who usually has to be coached by the judges: "Bapak Hakim, saja minta supaja saja dihukum tjerai dari suami saja, . . ." (literally, " 'Father' judge, I request that I be sentenced to a divorce from my husband, . . ." [21]) Thereupon the chairman asks the plaintiff's name, address, place of birth, where she was married, and so on, all of which is checked against documents which she has been asked to bring from her *lurah* (village

[21] This wording is not merely colloquial; that the wife should be so sentenced does imply a moral burden.

head). For the rest, however, the examination is hardly straightforward. Rather it is mixed with a constant effort by most judges to warn the wife of the moral pitfalls of divorce or to conciliate the couple. If the husband is not in court, the wife—accompanied by her mother or sister or friends and the requisite witnesses—is often subjected to comments from the bench about the seriousness of her action, though culturally this is not very realistic and is not pushed hard. Here is a short and typical excerpt from a very brief hearing, in which the wife and her witnesses established that her husband had been gone for seven months, one more than enough to constitute desertion according to the marriage contract.[22]

> JUDGE: Muhimah, earlier you asked to be divorced from your husband. Now, if the court decides to grant this divorce, you won't regret it, will you?
>
> MUHIMAH: No, *pak*.
>
> JUDGE: You're happy to become a divorcee [*djanda*, which also means widow]?
>
> MUHIMAH: Yes.

The divorce was then granted on the payment of a small court fee. This kind of mild didactic pressure is very common in the Islamic courts, enough so to suggest that religious judges tend to conceive their role partly in terms of moral, educational, and religious control.[23]

When both wife and husband are in court, many judges assume a mediating role as well. The examination proceedings are interspersed with inquiries by the chairman whether wife and husband would like to rethink the issues between them, or whether the wife is now ready to obey her husband, and whether the husband is prepared to take better care of his wife and to fulfill his contractual and familial responsibilities. But judges differ on the extent to which they play the role of conciliator. For some it is as natural as one can imagine, the judge spending as much time trying to repair the marriage as he does ascertaining

[22] This case occurred in the *pengadilan agama* of Djakarta on December 3, 1964. Notes on it were taken by a research assistant, Arif Fadillah, to whom I want to record my debt for his sensitive help.

[23] When the husband does not appear in court, an announcement of the court's decision granting a divorce must be posted outside the court for a period of thirty days, to fulfill the requirement that all parties must be informed of the process.

facts. Such judges are not at all reluctant to postpone a case in the hope that the wife who has demanded a divorce will reconsider the issue and return to her husband. As a last resort the court, sufficiently supported by legal rules or lack of evidence to support the wife's case against her husband (e.g., desertion, cruelty, failure of maintenance, etc.) may simply deny the divorce, not merely because the law so determines but because some judges hope the marriage can be worked out after all. This approach disfavors wives in contrast with husbands, who can divorce their wives almost by saying so. But, as will be indicated in the next chapter, the courts do serve to improve the overall balance slightly.

Other judges, particularly in large cities—though there are important individual exceptions here—take the conciliation function much less seriously. Some judges will forego an opportunity to reconcile a marriage in favor of getting a case over with. For example, a case in Medan, where the court tended to take a rather mechanical view of the cases before it; the following is excerpted from my notes in the courtroom (May 10, 1960):

> One case was a divorce action brought by a young girl who did not seem at all certain she wanted a divorce; she may indeed have been urged on by someone in her family. Her husband, also in court, clearly did not want to divorce her. She claimed he had hit her, raising her lip. . . . He said that he had hit her by accident; he was angry, she grabbed his watch, he swung his arm to break her grip, the watch band broke and his hand struck her on the mouth. He showed the watch and broken band to the judge. The judge questioned them for a time and then sent them away from the bench for fifteen minutes to think things over. . . . In the meantime the court heard and settled another case. The couple was recalled, and the judge asked the wife whether she stuck to her story and still wanted a divorce. She seemed uncertain on the divorce, whereupon the chairman and two member-judges told her to be firm and make up her mind. Finally she said yes. The judge bade her to turn to her husband and ask for a divorce, which she did reluctantly after more coaching. Her husband refused. She then took an oath, made the formal request to the judge, paid her two and one half rupiah, and was declared divorced, much to the confusion of both her and her husband. The husband protested, whereupon all the judges told him that if he wanted to protest he should appeal, which he finally did by signing a document in con-

siderable confusion and dismay. Both he and his ex-wife then politely thanked the court and left.

This is by no means typical, but it does happen in busy courts, and all the more so where judges are not closely in touch with their clientele. Even here it is evident from the above notes, however, that at least a *pro forma* attempt is usually made to give the couple a chance to reconcile.

(Alongside informal conciliation, a formal arbitral procedure also exists that is both legally and socially significant in dealing with marital disaster. This is the *sjiqaq* (break-up) proceeding, which will be dealt with in the next chapter.)

Once the court has satisfied itself on the facts of a case before it, an appropriate rule is invoked from the Koran or commentaries on the law, and the divorce is granted or denied. The kinds of situations that come to Islamic courts are essentially few, and formulas are usually readily at hand for the judges to apply. Although theoretically it is possible for litigants to have the Hanbalite, Malikite, or Hanafiite rules applied to their cases, I know of no instance in which this has ever been done. Sjafi'ite doctrine is firmly ensconced in Indonesian Islamic legal thought and practice, and most judges pretend to little knowledge about the other schools. Nor do judges seem very impressed by the traditional requirement that the *kadi* should be versed in all the doctrinal schools.

Procedure in Islamic court hearings is comprised of a mixture of occasional highly formalized ritual, sacral and nonrational in Weber's sense of the characterization, and rather nonformal, almost freewheeling, examination in the ascertainment of facts. Along with the quality of religious judicial personnel, it is this procedural obscurity more than anything else that draws abuse by civil lawyers, Islamic intellectuals, and reformists.[24] The traditional Islamic law of procedure is really quite strict and detailed on matters of judicial uprightness and the correct assessment of valid witness.[25] But it evolved and froze centuries ago,

[24] Thus, according to the chief judge of the *pengadilan tinggi* (civil appeals court) in Medan: "The *pengadilan agama* of Sumatra are in a confused state. They have no procedural law at all, no legal basis which determines how sessions should be run, no authority to summon witnesses to court, and so on. . . ." [April 22, 1960]

[25] See Tyan, *Histoire*, pp. 212–284 and esp. pp. 287–293ff.; Reuben Levy, *The Social Structure of Islam*, pp. 342–347; Ash-Shiddieqy, *Dasar-*

before this era of rapid communications, literacy, and new complexities. A comment by Snouck still probably sums up the situation best:

> The rules concerning procedure are medieval and on the whole unsuitable for a modern society. Little weight is given to written evidence. Legal proofs are confession, which is considerad decisive, the declaration of two witnesses of good reputation (*'adl*), and, in certain cases, the declaration of one witness together with the oath of the plaintiff. As the evidence of non-Muslims is excluded, the good reputation demanded of witnesses defined in such a way that only very few Muslims can be considered *'adl*, and the evidence of Muslim women admitted only very exceptionally and then only from twice the number required of men, satisfactory proof by witnesses would be impossible in most cases if practice had not considerably mitigated the theoretical requirements. If there is no legal proof, the defendant wins his case if he takes the oath in support of his contention. Should he refuse, the plaintiff wins if he on his part takes the oath. The courts of the *cadis* feel themselves obliged to maintain these antiquated rules as far as possible, if only *pro forma*. This is another reason why political progress has led to an increasing restriction of the competence of the *cadis*.[26]

In Indonesian Islamic courts, as elsewhere in the Islamic world, most of the traditional procedural rules are in fact too demanding and limiting to be followed closely by judges, though these rules are defended when challenged. Yet the informal rules of procedure that have developed *ad hoc* in response to need have not been codified in any useful way. To do so explicitly would require an admission that the Sjariah rules are inadequate to modern problems, an admission that the traditionalists in control of the courts cannot comfortably make.

Procedure in Islamic courts consequently appears to be haphazard. The judges establish facts in whatever commonsense ways they can, being deprived of any authority of or resources for independent investigation outside of court. Litigants bring their own witnesses, if any are available, and the witnesses tend

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Dasar Kehakiman, pp. 48ff. Ash-Shiddieqy bases much of his discussion of the modern period on materials from Egypt and avoids dealing with conditions of procedural law in Indonesian Islamic courts, though some of what he writes seems intended as an example for Indonesia.

[26] From "Islam," in G. H. Bousquet and Joseph Schacht, *C. Snouck Hurgronje: Selected Works* (Leiden: Brill, 1957), pp. 70–71.

(though not always) to reiterate the statements of the litigants. Seldom are witnesses examined carefully by the judges, who really have no way of catching a lying witness in any but the most blundering falsehood. Opposing witnesses are something of a control, but usually the two sets of witnesses merely stick by their stories, and it is most difficult, without effective cross-examination, to say who is right. Documentary evidence is sparse in marital affairs, and it is not always taken as seriously as oral testimony. When witnesses are lacking, personal oaths are given profound credence as evidence of veracity, as Snouck mentioned in the quote above; Islamic legal tradition relies considerably on oaths, and this is equally true in most local Indonesian cultures. What stands out in the whole of Islamic judicial process is the lack of any consistent and refined means to develop a realistic picture of truth.

This last statement requires further comment, but, before making it, some discussion is needed of the possibilities of greatly improving procedure in the Islamic courts.

First of all, it is clear that some improvements have in fact been adopted. The Islamic courts have not stood still in the development of their procedures, but the development has been gradual and unsystematic, and the courts vary considerably among themselves in the extent to which they have accommodated procedure to new problems. For example, as postal communications have (erratically) improved, Islamic courts have increasingly called upon one another for assistance relating to cases in which a necessary piece of information lies in another district. Another court may be asked to examine a witness who lives in its jurisdiction, or to provide proof of a valid divorce or marriage.[27] Moreover, as various kinds of documentary material

[27] For example, two typical cases from the *pengadilan agama* of Deli/Serdang in Medan. In one, a marital dispute raised a question whether the marriage was valid, and it appeared that a falsification of documents might have occurred. The brother of the wife told the court he would swear that the marriage was valid (*sjah*), but the chairman insisted upon writing to the *pengadilan agama* of Padang, where the marriage had allegedly taken place, for relevant information. In another case, a wife in Medan had received a certificate of repudiation from her husband who was studying in Bandung. She inquired of the court whether it was valid, and the court wrote to the *pengadilan agama* in Bandung to clarify the situation. Both cases occurred on the same day, May 12, 1960. Interestingly, in this second case, wherein the husband was a military officer, the court asked a witness from the air force

have become more common, Islamic courts have more and more come to welcome them as evidence. In a case in Djakarta, the court accepted an angry letter from a husband to his wife, in which he repudiated her (*talak satu*), as adequate proof of his intention, despite his insistence in court that he did not mean it.[28] Other sorts of documents—marriage certificates and contracts, divorce certificates, birth certificates, identification cards, certificates of residence, and so on—have proliferated voluminously, and increasingly they have shown up in the work of the Islamic courts. But much of this kind of adaptation, though significant, is characteristically fortuitous.

Basically the likelihood of far-reaching rationalization of Islamic judicial procedure is extremely limited. Religious judges are wedded to traditional ways of doing things, for which they find support in Islamic legal history and doctrine. Having little to do with secular institutions, and with not much appreciation of them, Islamic judges are only slightly influenced by civil judicial example. Such influence as there is consists mainly of superficial borrowing—green felt tables, occasional elements of judicial demeanor, and so forth. When a deeper influence does creep in, often by way of an assertive clerk with some secular law education, considerable tension may result. This happened in a *pengadilan agama* session I observed in Medan in the Deli/Serdang area, where the court clerk, M., had spent a year or so in the civil law faculty of a state university.

> After the session M. was angry. During one of the cases, involving the validation of a marriage document, M. started an argument with the chairman of the court and one associate judge, a *kadi* who had spent long years in Mecca and prided himself on Arabic being his first language, about what kind of evidence should be accepted by the court. The argument was open and public, in the midst of the hearing, with some table slapping and loud talk. When the session ended, the argument started again, with M. quite upset, until the *kadi* waved him aside and finally walked out of the building. M. later explained

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whether he knew anything about military regulations pertaining to divorce. He had heard, correctly, that the military placed certain restrictions on polygamous marriages and divorces. The witness did not know, but what is important is that the chief judge obviously believed such regulations should be considered in his disposition of the case, even though they placed conditions on the Islamic law of matrimony.

[28] December 31, 1964, from notes taken by Arif Fadillah.

> that the question involved what kind of proof the court should accept and how it should go about establishing facts. . . . He said heatedly that they [the judges] follow the traditional [*kuno*] process and accept as true whatever the litigants and witnesses say. According to all his knowledge, learned in the university and from law books, this is the wrong procedure. Judges must examine testimony, check it against documents and other materials. They must actively seek to establish truth. But the *pengadilan agama* is not doing this at all. . . . [May 12, 1960]

For basically the same reasons as the clerk's misery, the ideas of modernist thinkers and leaders have had limited impact on religious courts. Islamic judges have a vested interest in the Sjafi'ite texts on which they were raised. And although they have not been unaffected by modernist thought, and are not particularly rigid in the use of traditional texts, to admit wholesale to reformist demands for flexibility, innovation, and adaptation of old doctrine would represent too much of a challenge to their own skills. Moreover, since the Islamic political and intellectual leadership of Indonesia is divided on issues of doctrine, and the bureaucracy is more closely related to conservative tendencies, there is more than sufficient support for a no-change position.

There is still another fundamental reason why little procedural improvement can be expected in the religious courts. This is the relative impuissance of the *pengadilan agama* and their dependence upon the civil judiciary for executive functions. It is not merely that an Islamic court decision—on maintenance, say—cannot be enforced without a request to the local first instance court. This is difficult, limiting, and humiliating enough, especially if the local civil judge is anti-Islamic, or hostile to Islamic legal institutions for whatever reasons. But in addition Islamic courts do not have any other ancillary authority to call upon the civil administration. They cannot subpoena defendants or witnesses, for example, nor call upon the police for assistance. These procedural insufficiencies impose effective limits on what the Islamic courts can do and what can be improved in their operations. Moreover, the lack of working procedural links with executive administration, outside of the Islamic bureaucracy itself, also means that few institutional controls exist that might lead to systematic pressure for refinement of process. The condition of their clientele, particularly among people with marital

problems, does not encourage pressure from this direction either. Better-off people and intellectuals who might concern themselves with such problems tend to look down on Islamic courts and have little to do with them.

Appeals from the *pengadilan agama*, possible in Java and Madura since the late 1930s and in most places in the outer islands since the 1950s, also do not offer an impressive means of control or procedural refinement. Where a first instance Islamic court has made an obvious error—for example, trying a case with two rather than three judges—the appeals court may quash the decision, order the case retried, render a superseding decision, or merely reprimand the lower court, thus compelling conformance to statutory procedure.[29] But this has little to do with basic problems of appreciation of evidence and the like, in which Islamic appeals courts share the deficiencies of lower courts. Quite apart from this point, however, not all that many appeals occur. Frequency of appeal would seem to be encouraged by extraordinarily low fees, amounting to only a few *rupiah*. This is the case in civil courts, where it is uneconomic not to appeal. But the stakes in civil cases are generally higher, while the issues raised in religious courts do not lend themselves to all-out fights. By the late 1950s about 150–200 cases per year were appealed to the Mahkamah Islam Tinggi, and the number was rising. In the outer islands the number of decisions brought before the Islamic appellate courts in Medan, Palembang, Padang, Bandjermasin, and Makassar has been small in absolute terms, though proportionately higher than in Java. The situation in 1959, the last year for which I have precise statistics on appeals, is shown in table 1.[30]

This picture is unquestionably distorted, for in 1959 the Islamic appeals courts of Sumatra and Sulawesi were new and still relatively unorganized; so indeed were many *pengadilan agama*, which accounts for the few PA decisions in those areas compared with Kalimantan, where the Kerapatan Qadi and appeals court of the southern province have a longer history. Since

[29] Notosusanto, *Organisasi*, pp. 99–100, reports a case of 1957 in which the MIT quashed a decision of the *pengadilan agama* of Kebumen because the court had sat with only one judge. The MIT was then itself reprimanded by the Directorate of Religious Justice for having failed to order the lower court to re-examine the case.

[30] These calculations are based on statistics from the Directorate of Religious Justice.

TABLE 1. APPEALS

	Pengadilan agama decisions	Appeals	Percentage
All of Java	31,105	198	00.63
Atjeh	703	59	08.1
North Sumatra	1,943	22	01.1
Central Sumatra	769	3	00.39
South Sumatra	329	7	02.2
Kalimantan	810	9	01.1
Sulawesi	431	1	00.23

1959 the number of cases heard and decided at the first instance level in outer island provinces has increased, and presumably the number of appeals has risen also. Nevertheless, what is clear is that few decisions are in fact appealed. As has been indicated in an earlier chapter, the new appellate jurisdiction of the Directorate of Religious Justice has not yet led to a great deal of appeals work at this level either. It is possible, however, that in time the review work of the directorate may lead to a higher level of procedural care, at least in terms of statutory provisions, and perhaps to some efficacious refinement. Indeed, it was a question of procedural error which led to the directorate's assertion of a right of review.

But to return to our earlier discussion, it is worth asking what the result of modernizing procedure, if it were possible, would be. For the procedural purist, the present situation in Islamic courts can only represent chaos and even injustice. The lack of care given to matters of evidentiary value must lead to an utter failure to establish truth. Here, however, the matter becomes complicated, for while the *legal function* of courts may be to establish the "truth" of a situation, and to apply the law accordingly, their *social* function may be quite different. From a point of view different from that of legal purists, one vaguely held by many Indonesian Islamic judges, truth is hard to establish and it might lead to much greater injustice. For religious judges, very often, truth is not only relative but secondary to an essential concern with overcoming a bad human situation. Ascertaining facts is sometimes no more than an entrée to the work of reconciling a couple. Moreover, as will be argued in the following chapter, Islamic courts do in fact offer a way out of unhappy marriages for many women; it is the only fully above-

board, legal, and consistently accessible way they now have. If the courts were to take evidence much more seriously than they now do, this might result in a much higher rate of denial of divorces. Islamic judges do not offer this kind of argument and may not even think it. They are more likely to argue the case of perfection for all Sjariah rules. Yet functionally, at least, the lack of procedural clarity and precision does facilitate a measure of substantive social justice.

CHAPTER FIVE

Islamic Courts and Divorce: Function and Change

SO FAR WE HAVE DISCUSSED THE POLITICAL FOUNDATIONS and organizational evolution of the Islamic judiciary in independent Indonesia. Now it is time to turn to an examination of the substantive competence of the courts. Neither this nor the following chapter is explicitly concerned with the substantive law of divorce or inheritance, though a review of divorce actions is included in this chapter. Rather, the purpose of our discussion here is to analyze the limits of functional change in the Islamic judiciary. Two questions are in order. One is the extent to which Islamic courts in Indonesia can be restricted by positive state action; this issue will be taken up in the next chapter on inheritance. The other question is how useful are Islamic courts for achieving the kinds of change for which they seem most appropriate—in this case divorce reform. The answers to such questions must always be partial. But they cannot be answered at all without an analysis of the social functions and style of these institutions, by which I mean simply the needs they serve and how they serve them, apart from whatever written law insists they do. For our purposes here, a necessary analytical perspective is that the links between legal institution and substantive law are function and procedure; the law *is* the way it

is applied, and its purpose, seen sociologically, is what its effects actually are.

REGISTRARS, COURTS, AND MARRIAGE COUNSELING BOARDS: SOCIAL ENGINEERING AND INSTITUTIONAL INNOVATION

Marriage rules and their reform are the most pressing legal issue in Islam today. Pound for pound, more is written about the subject than any other Islamic legal problem. The reasons seem clear, and some of them apply as well to other major religions as to Islam. The family is the nesting place of religious strength and growth. Religious regulation of family life represents an ultimate claim of responsibility for the propagation of people and for the maintenance of their responsibility to God. Nearly everywhere state organization and religious organization have eventually contested for influence in the family. In this age of the state, state influence has grown, though the church has seldom been pushed out altogether. Catholic influence in the marriage law of Europe and the Americas is well known. But civil hegemony is reflected not only in the source of legislation but in the kinds of institutions held responsible for implementing the law of family relations. Here trends favor the state more and more. Matrimonial courts, domestic relations courts, family planning councils, welfare boards, marriage counseling agencies, and so forth in proliferation have increasingly become state-run affairs. The churches have gradually been restricted to influencing legislation, and religious values have been hard put to keep up with social and cultural change. Against the relative flexibility and adaptability of the civil state, the relative rigidity of religious norms puts them at a disadvantage in any competition for the loyalty of men and women liberated enough to demand change.

By contrast Islam has held on to family-law institutions longer than other major religions; an exception, perhaps, is Judaism in Israel, which also has a ministry of religion and probably for much the same reasons as Indonesia. The main formal institutions of Islam, other than the Mosque, have to do with little else. In the history of Islamic law, indeed, most parts of the Sjariah were relinquished rather than permitted to be sullied by imperfect application. Only personal law was fiercely defended, largely for value reasons but also because a distinct bureaucracy had grown up around them. In addition, however, they could be maintained because family law probably seemed less crucial

to the state, then not yet total, than other economic and social institutions. In the modern age, when the claims of the state have become total, Islamic family-law institutions have been intruded upon with nearly as much determination as in non-Islamic countries.

But as with Christianity in Europe and North and South America, though with a different mix of relations between religion and state, the situation of Islam with respect to control of the family varies from country to country. In much of the Middle East and Pakistan civil governments have pushed through marriage reforms with more or less of a fight and with more or less success.[1] Usually these reforms accept an Islamic framework for the law. To make a complete ideological break is politically too dangerous and, perhaps, goes against the grain of beliefs many civil leaders themselves hold. In any event, there have been reforms, some of which rely upon manipulation of existing Islamic rules and institutions and some of which really do represent new rules, albeit with a legitimizing root in the past. The most impressive of them have resulted in new codes—in Morocco, Tunisia, Syria, Pakistan, among others—which at the very least imply a new source of legislation in the state imperium rather than the Koran. More than that, of course, they mean some improvement of the status of women, who may now be guaranteed—by how much is not at all clear—the kind of protection which older religious law did not provide.

No such codes have appeared in Indonesia, though a demand for marriage-reform legislation has been at issue since the mid-1950s. The strength of politically organized Islam has caused its opposition and civil government generally to tread a bit shyly at times, yet not without enthusiasm. There has been a great deal of pressure within society for institutional change, and government forums and agencies have become involved. The primary proponent of marriage-law reform has been a respectably powerful urban, intellectual, and upper-class women's movement, whose history begins almost simultaneously with that of the na-

[1] See, *inter alia*, M. Borramans, "Codes Regulating Personal Status and Social Evolution in the Muslim Countries of Syria, Morocco and Egypt," in the modernist journal *Islamic Review* (Sept. 1966), pp. 14–18, and "Codes Regulating Personal Status and Social Evolution in Certain Muslim Countries," in the following issue of the same journal, Oct. 1966, pp. 9–12.

tionalist movement itself.[2] Polygamy, ease of divorce by husbands, and the limited range of women's rights have been the major targets of reformers. Their demands have grown out of the same kinds of social change that have produced similar reform movements elsewhere in the world: a growing intellectual liberation of upper- and upper-middle-class women, an easing control over women in urban society, the impact of egalitarian ideologies, and the influence of foreign examples.

The legal position of Indonesian women was never as weak as in the Middle East. They have been too active and essential in the agricultural economy, in the marketplace, and in traditional handicraft industries to be shunted aside or overwhelmed socially. Islamic rules and traditions were compelled at an early stage to accommodate to Indonesian customs. It is usually pointed out, for example, that Indonesian women never adopted purdah. But most rule changes that were worked out in Indonesia were essentially matters of degree, though sometimes enormously significant. For instance, the *ta'lik ad talak* formula, pronounced after the signing of the marriage contract, in which Indonesian Muslim men agree to a number of conditions whose violation permits their wives to demand divorce, was mainly a general application of a contractual arrangement already possible in Islamic marriage law. But it was carried much further in Indonesia to give women a variety of legal protection against the arbitrary will of their husbands that is barely matched elsewhere in Islamic countries.[3] Nevertheless, in the twentieth century demands for change have become more basic—prohibition of polygamy is symbolically the most threatening demand—and the all but automatic public response by organized Islam has generally been to defend the religious law as immutable.

Even so, it has been impossible for Islamic leadership to wave these issues aside, and many do not want to. As in other Islamic countries, Muslims in Indonesia are divided on the prob-

[2] See Cora Vrede-de Stuers, *The Indonesian Woman: Struggles and Achievements* (The Hague: Mouton, 1960).

[3] The *ta'lik-talak* is known in West Malaysia but evidently is not commonly used in all the Malayan states. Where it is used the conditions included appear to be more limited than those current in Indonesia. On this and other problems worth comparison between Indonesian and Malaysian Islamic legal practice, see Dr. Ahmad Ibrahim, *Islamic Law in Malaya* (Singapore: Malaysian Sociological Research Institute, 1965), pp. 208–210.

lem of marriage reform. In general, traditionalist groups are reluctant to accept explicit legal change, and reformist groups are less reluctant but still devoted to the essential principles of the Sjariah. More precisely, however, political leaders in charge of symbol manipulation tend to be strongly opposed to any legislative change that challenges basic principles of ancient Islamic law. Urban intellectuals and professionals, whether they belong to modernist or traditionalist organizations, and, interestingly, many Islamic bureaucratic leaders (not least of all in the Directorate of Religious Justice) tend to be far more open even to what seems to be radical change—for example eventual prohibition or discouragement of polygamy. These latter groups cannot speak out loudly, however, without losing influence in their parties and official constituencies. In any event, draft marriage codes have been lying about Djakarta for years. After Islamic parties defeated a frontal assault on Islamic marriage law in Parliament in the mid-1950s, just as a reform attempt had been defeated in the 1930s, a new bill was drafted in the Ministry of Religion itself during the late 1950s or early 1960s.[4] This bill, and several others proposed by reform-minded groups and Christian organizations (for Christian marriage, of course), became the subject of serious negotiation again in the late 1960s; the change of regimes following the coup of 1965, and the concomitant relaxation of political tension for a time, encouraged consideration of this sort of social problem again. As of this writing, however, no new legislation has yet appeared. One key issue is whether there should be a general statute for all religious groups, with scheduled provisions for Islamic, Christian, and Hindu obligations, or wholly independent statutes for all major religious groups. Christian groups have advocated a general integrative statute. In part they have less to lose, for Christian marriage is now governed by European-based codes that already provide some state guarantees for women, but they also fear that statutory autonomy in marriage regimes—which they might

[4] On the parliamentary struggle for marriage-law reform in the 1930s and 1950s, see Vrede-de Stuers, *The Indonesian Woman,* and Nani Soewondo-Soerasno, *Kedudukan Wanita dalam Hukum dan Masjarakat* [The position of Indonesian women in law and society] (Djakarta: Timun Mas, 1955), the most informative book yet, by a leader of the women's movement. See also, on prewar efforts to reform Islamic marriage rules, G. F. Pijper, "De Strijd om de Monogamie," 21 *Koloniale Studien* 476–490 (Oct. 1937/5).

otherwise favor—could lead to similar demands for Islamic autonomy in other areas of social, political, and economic life, which ultimately would threaten the minority interests of Christians. Islamic groups, on the other hand, have held out so far for separate and independent statutes governing the marriage regimes of the predominant religious groups. They fear, many of them, that a general statute might introduce an opening wedge of uncontrollable reform and, perhaps, that it would weaken Islamic authority over Muslim family life. In addition, however, some stalling by Islamic leaders inevitably results from their inability to settle lasting issues of change within the Islamic law itself: for example, whether Islamic marriage provisions should be drawn only from Sjafi'i doctrine or from the other *madhab* (schools of legal doctrine) as well.

This is not the place to deal at length with these developments, or nondevelopments. Rather, the response of existing institutions to reform demands will be taken up—briefly, because the response has been limited though interesting. It will be useful to make a few comments first on how Islamic administrative and judicial machinery handles divorce and related actions.

Although no extensive discussion of the problem is warranted here, the divorce rate among Indonesian Muslims is high, indeed one of the highest in the world. Whether this is socially good or bad depends upon one's point of view. It has, however, drawn the attention of those who want reform of marriage law, on grounds that a very high rate of divorce creates social instability, works hardship on mothers and children, and is fundamentally unfair to women. Actually, though more research needs to be done on the matter, divorce seems to have been accommodated socially in ways that reduce hardship.[5] Divorced women tend not to be rejected by suitors and in some areas (at least in

[5] It is nearly always a mistake, of course, to take either the joys or the miseries implied by written or unwritten law at face value. Only the facts of social life, which may mitigate the effects of harsh rules or make unbearable those that were intended to be helpful, can indicate what law and laws are all about. For an apposite discussion of the social limits on the freedom that Islamic marriage law apparently gives to men, see the brief case study in Morocco by Lawrence Rosen, "I Divorce Thee," *Transaction* 7 (June 1970): 34–37. Mr. Rosen modestly limits his conclusions about the "dynamic interplay of family law and social structure" to "a number of the developing nations." But there is no reason to suppose that social reality has any less influence on law elsewhere, in old as well as new states.

Java) are considered particularly desirable, maternal grandparents care for daughters and their children, and so on.[6] But it cannot be denied that misery is involved—economically, socially, and emotionally. Nor is there any doubt that women bear the brunt of such misery. When the Prophet Muhammad changed the old Arabian tribal rules of family law, he meant to and did immeasurably improve the lot of women, giving them rights and assurances that did not exist before. But nothing like equality came of it, of course, and now the cards of Islamic marriage law remain stacked against women.

Available statistical data on divorce in Indonesia are imperfect, and in other countries where comparison might be useful they are not much better. Based on what we have, however, from 1947 to the present the number of repudiations (*talak*) registered each year in Indonesia run from about 50 percent to 58 percent of the number of registered marriages. Reconciliations (*rudjuk*) total from approximately 5 percent to 10 percent of repudiations.[7] These are rough figures, hiding many inaccuracies and wide variations from area to area; in one or two *kabupaten* the divorce rate may be as high as 80 percent. Aggregate statistics show that Indonesia's divorce rate is anywhere from two to five or more times that of several Middle Eastern countries, though about the same or even less than that of Malaya.[8] A high rate of divorce is unquestionably facilitated by

[6] See, for example, Hildred Geertz, *The Javanese Family* (New York: Free Press, 1961), pp. 137ff.

[7] These figures have been calculated from statistics obtained from the Ministry of Religion. Aggregate statistics can be found in Sidik Soedarsono, *Masalah Administratif dalam Perkawinan Umat Islam Indonesia* [Administrative problems in Indonesian Islamic marriage] (Djakarta: Fa. "Dara," 1965?), a good survey and analysis of the Islamic bureaucracy concerned with marriage problems, along with a discussion of efforts to draft an acceptable new statute on Islamic marriage. Few other legal problems in Indonesia have produced studies of this kind.

In the mid-1950s some research was done on causes of divorce in Java. Nashruddin Thaha, in *Pedoman Perkawinan Umat Islam* [A marriage guide for the Islamic community] (Djakarta: Bulan Bintang, 1957), pp. 84–85, gives the following figures on grounds for divorce in fourteen *kabupaten* of Central Java in 1954. Of the total 79,750 divorces, 23,664 were because of neglect of responsibility, 18,343 because of economic problems, 12,669 because of "psychological crisis," 9,451 because the husband had taken another wife, 7,174 because of biological problems, 1,615 because of political problems, and 6,834 for other reasons. These were all *talak* divorces.

[8] Drawing on data reported in the *Demographic Yearbook*, 1958,

Islamic legal rules. If available statistics mean anything, however, it is that (for some reason) these rules have been put to more use in the Malayan culture area than elsewhere in the Islamic world. As a hypothesis, it might be suggested that the greater social strength of women in Indonesia and Malaysia, compared with Middle Eastern women, actually has something to do with this, but the matter will not be pursued here.

The burden of official work in Indonesian Muslim matrimonial matters falls not on the religious courts but on the administrative arm of Islamic bureaucracy. A primary responsibility of most Islamic officials other than educators, in fact, has to do with registering marriages and repudiations and handling related problems. It was for this reason that one of the first acts of the new Ministry of Religion in 1946 was to try to bring some control, order, uniformity, and probity to registrars of marriage, divorce, and reconciliation (*pentjatat nikah, talak, rudjuk*:NTR). Afterward, much of the ministry's attention, through local religious offices (Kantor Urusan Agama: KUA) was focused on these

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Vrede-de Stuers notes that in 1956 divorces in Egypt numbered 26 percent of marriages, in Algeria 15 percent, in Iraq 10 percent, in Iran 18 percent, and in Syria 8 percent. The figure she gives for Indonesia in 1956 was 52 percent. (*The Indonesian Woman*, p. 131.) The same pattern appears to be maintained in the data reported by the *Demographic Yearbook* for later years, but the statistics, seldom fully accurate, are too rough (and occasionally nonexistent for the late 1960s) to record here. Comparable data for Malaysia indicate a divorce rate that averaged 57 percent for all the states of West Malaysia and Singapore in the years 1947–1957. Shirle Gordon, "Marriage/Divorce in the Eleven States of Malaya and Singapore," *Intisari* II/2 (n.d.). In the same issue of *Intisari*, published by the Malaysian Sociological Research Institute, an article by Mrs. M. Siraj indicates the effect of new counseling procedures in reducing the divorce rate in Singapore from 51.7 percent in 1957 to 26.8 percent in 1962, at p. 20. See also the interesting and valuable study by Judith Djamour, *The Muslim Matrimonial Court of Singapore* (London: Athlone Press, 1966).

While adequate statistical data on the point are unavailable, the divorce rate among Christian groups in Indonesia appears to be much lower than that of Muslims, though civil judges claim Christian divorces also are on the rise. All Catholic and Protestant divorces are subject to still extant colonial statutes, based on older European standards that make divorce quite difficult, and they must go through the civil courts. This naturally depresses the incidence of divorce among Christians. But the difference in divorce rates is probably also influenced by class factors. Christians tend to come from higher social-economic strata. There is, again, no way of proving the hypothesis with available statistics, but it is likely that Muslims—devout or nominal—of higher class standing also have a lower divorce rate than the national average.

officials. Lack of government concern during the colonial period had permitted wide variation in Islamic marriage practices, corruption by unpaid registrars, and even a good deal of open avoidance of religious-legal obligations. With the establishment of an interested national ministry, official pressure for uniformization, specialization, supervision, and control brought some order to this chaos, though continuing difficulties of marriage-law administration should not be underestimated.

It is to village religious officials or *ketjamatan* religious offices that couples who want to marry first go. Necessary forms are filled out, indicating background of the prospective spouses—mainly to avoid violation of kinship restrictions and conditions of previous marriages that might affect the validity of their marriage—and who is to represent the bride as guardian (*wali*). If a kin related *wali* (*wali-nasab*) is unavailable, the local KUA appoints a *wali-hakim*. Later, on the day of the marriage—attended by an official, male witnesses, the *wali*, but not the bride herself—the husband signs a marriage contract and (frequently) pronounces the *ta'lik ad talak*, which is printed on the reverse side of the marriage certificate (*surat nikah*). If a prospective husband objects to the *ta'lik-talak* and his bride-to-be does not insist that he accept it, it need not be pronounced. But, although the *ta'lik-talak* is often enough still ignored, women nearly everywhere in the country are becoming increasingly aware of its benefits and are making it a precondition of marriage. Both the marriage contract and the *ta'lik-talak* formula have been made uniform throughout Indonesia by the Ministry of Religion. By the *ta'lik-talak* the husband agrees to divorce his wife—assuming she wants it that way (and can prove the violation in court)—if he leaves her for six months or more consecutively, or fails to give her proper maintenance for three months consecutively, or physically abuses her, or neglects her for six months consecutively.[9] These four conditions are now standard in Indonesia. However, a bride may insist on additional conditions. Well-educated urban families sometimes stipulate, for example, that the husband's taking of a second wife is grounds for divorce. Some religious officials object that this condition cannot nullify the rule of polygamy, but it is nevertheless frequently accepted if the husband

[9] Soedarsono, *Masalah Administratif*, p. 236. The contract was made uniform for all of Indonesia by Decree of the Minister of Religion no. 14/1955.

has no objection.[10] A rather more acceptable version of the condition is that a wife is entitled to divorce if her husband takes another wife without his first wife's permission.[11] The *ta'lik-talak* arrangement obviously provides a rather flexible contractual instrument of marriage reform, one that has developed uniquely on its own in Indonesia. But its limits are equally obvious, in that, unlike legislative reform—to which most other Islamic countries have ultimately resorted—it depends upon individual action and the cooperation of Islamic officials. Religious officials have been reasonably open on this score, almost as if it were recognized that this is the price of avoiding more thoroughgoing reform, but their willingness to accept new conditions is by no

[10] Cf. N. J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago and London: University of Chicago Press, 1969), pp. 29–30. Coulson points out that most Hanafi, Maliki, and Sjafi'i jurists regard such a condition in the marriage contract—that the husband may not take a second wife—as a nullity, for the husband cannot bind himself not to exercise a right granted him by the religious law. It is likely that the symbolic threat to polygamy of this condition led many Islamic legal thinkers to reject it out of hand. Hanbali law, however, permits the no-polygamous-union condition. Jordanian, Moroccan, and Syrian reform laws incorporate the Hanbali view of the matter. See J. N. D. Anderson, *Islamic Law in the Modern World* (New York: New York University Press, 1959), pp. 50–51.

[11] The Ministry of Religion itself has suggested that this is one of several other permissible conditions that may be appended to the *ta'lik-talak* pronouncement. See Ibrahim, Maryet A, and Al Ustazdh Hadji Abd. Halim Hasan, *Pengantar Hukum Islam di Indonesia* [Introduction to Islamic law in Indonesia] (Djakarta: Endang, 1965), p. 358. See also Vrede-de Stuers, pp. 34–35, for a fuller discussion of the *ta'lik-talak* and its origins, and pp. 167–175 for examples of the *ta'lik-talak* used historically and now. Property matters may also be introduced into the *ta'lik-talak*. One effort of the campaign of women's organizations concerning marriage reform was to make women aware of conditions they might impose on their prospective husbands. In general, however, not that much attention is paid the *ta'lik-talak*, even in its simplest official form, particularly among peasants and the urban poor. It is often pronounced and frequently used as the basis of divorce, but few women or their families are aware of the possibilities of stipulating even further guarantees. Or if they are, they seldom take advantage of these possibilities. Apart from other causes, it may be that the lack of contract conceptions in some Indonesian societies, especially as they apply to marriage, militates against fuller use of the *ta'lik-talak* potential. There are many other formal issues that surround the *ta'lik-talak*—for example, whether it should be read aloud before or after the contract of marriage is signed, whether it has to be signed, and so on—but they need not be dealt with here.

means consistent.[12] Nor can the Ministry of Religion, many of whose officials do favor some reform, go too far in expanding the range of *ta'lik-talak* conditions without finally challenging the integrity of Sjafi'ite doctrine.

Should the husband later decide to repudiate his wife for whatever reason, he need only declare it—"I divorce you" (*kamu aku talak*, or similar)—and register his action at the KUA along with his wife. Unless he has already done this twice before, or has in effect divorced her three times at once, he may take her back (*rudjuk*) within one hundred days (*'iddah*, the time span of three menstrual periods), also by registering his decision at the KUA. If he has divorced her three times, it is final and no *rudjuk* is permitted; if the wife marries someone else and is divorced by him, however, she and her former husband may begin all over again. Marriage, divorce, and reconciliation all require minor and now predetermined fees, but a bit extra is often given to the registering official privately. (Costs may be dismissed for indigents.) This whole process has gradually, albeit imperfectly, come under standardizing control by the Ministry of Religion. There are still people who do not register their marriages, and no doubt many more men who fail to register their *talak* and *rudjuk*.[13] Sometimes this is due to ignorance of the law, a condition which may gradually decline as village leaders become more aware of legal procedure. Sometimes, however, it is due to outright ideological rejection of Islamic authority by people (more so in ethnic Java than elsewhere) who claim other, but officially unrecognized, religious loyalities. In this latter

[12] In one case, for example, a well-known and outspoken woman leader in Djakarta insisted on behalf of her daughter-in-law to be, and her son agreed, that the *ta'lik-talak* should include not only the condition against polygamous union but, along with several others, also a provision for much more than the usual three months support of the wife should there be a divorce. The officiating penghulu accepted most of the conditions, with raised eyebrows, as long as the husband would accept them. But he absolutely refused to go along with the alimony condition, on grounds that it was too much of a deviation from the Islamic law of marriage. (Interview of Feb. 14, 1961.)

[13] One difficulty here is that KUA registrars do not have many sanctions at their disposal. They could take such delinquents to court on criminal charges, but this would be time-consuming and costly. Essentially the sanction is now one of potential inconvenience for those who do not register, but it is not yet a socially impressive sanction. See Soedarsono, *Masalah Administratif*, p. 103.

event, the Ministry of Religion may request an investigation by the Chief Prosecutor's office, which has a special bureau on unrecognized religious groups. In any case, it is in the interest of the Ministry of Religion and its local religious offices to extend their official jurisdiction over all Muslims. Mavericks are brought under pressure of one kind or another.

The ubiquity and responsibility of NTR registrars makes them prime candidates for influencing matrimonial behavior. Depending of course on their character and sense of responsibility, local religious officials have probably always played some role in avoiding flagrant abuses of legal rights. Particularly in village society, men were (and are) often discouraged from divorcing their wives too quickly and without sufficient cause by religious leaders who could bring to bear the pressure of familiarity and possibly even kinship. This remains true now, the influence of Islamic village officials naturally depending upon such factors as personal regard and the strength of religious beliefs in the village. A *lebai* from a village in Sumedang *kabupaten*, West Java, a man who evidently possessed considerable personal authority and a close relationship with the village chief (*lurah*), spoke of his responsibilities in these terms:

> His primary function is to take care of religious affairs in the village and to try to reconcile people who are thinking about divorce. . . . His procedure in such cases . . . is to wait for the couple to come to him, one or the other with a marital complaint. Sometimes, before talking with the couple directly, he goes to their parents and asks whether the father of either couple has tried to reconcile the two. If yes, how? Then he asks permission to talk with the couple, at the same time asking the parents to talk with them too. Then he tries to bring the couple to agreement. If he is unsuccessful, he sends them to the marriage-counseling board (see below) and from there to the KUA or Islamic court. [Aug. 19, 1959]

KUA officials in charge of registration are also now encouraged to advise estranged couples against divorce, to try to reconcile husband and wife, to discourage hasty action. One function of having both husband and wife come to the KUA to register a repudiation is precisely to give the registrar an opportunity to persuade them to reconsider; the registration form contains, in bold letters, the warning that divorce is an evil deeply despised by Allah. Occasionally administrative efforts at this

point to prevent divorce are successful—very occasionally. But generally marriage counseling of this sort does not go far. KUA offices are busy places, divorce is taken for granted, and registration officials tend to conceive their roles in fairly routine and specific ways. Usually, moreover, KUA officials, even at the *ketjamatan* level, do not have quite enough authority over or familiarity with most people to have great influence; nothing near so much, by comparison, as an Islamic village official where Islam is strong. Often the most they can do is delay a divorce briefly, and even that is unlikely (and unpopular) in a heavily traveled office.

While a husband may normally repudiate his wife with ease, suffering at most a trip to the KUA and some chatter from an official, the wife has a far more difficult time of it. Basically the problem is that the *right* of divorce rests entirely with men. Even the stipulations of the marriage contract amount only to a conditional repudiation by the husband, which the wife may invoke in appropriate circumstances. Conceptually, wives have no right to divorce at all. In reality, of course, it is all socially qualified, though never enough to strike anything like a balance. A woman who wants out of a marriage may compel her husband to repudiate her by making him miserable. Or she may buy a repudiation from him. Frequently husbands repudiate their wives merely on the latters' requests or by common consent. Statistically these are all repudiations by husbands; actually more than is commonly supposed are the result of wifely initiatives. There are no available long-run statistics on divorce initiatives, but some have been published for the single year of 1954 based on research done in Central Java. Just how the research was carried out is unclear, and the statistics must be regarded with some doubt, but they may reflect reality better than the usual myths about the subject of divorce. According to this research report, of 79,750 *talak* divorces in fourteen Central Javanese *kabupaten* in 1954, 23,081 originated in the husband's dissatisfaction, 17,482 in the wife's, and 39,187 were by mutual consent. The same survey done in the special district of Jogjakarta, also in 1954, indicated that of 9,767 *talak* divorces, the husband took the initiative in 3,836, the wife in 2,721, and both wanted out of the marriage in 3,210 cases.[14]

[14] Nashruddin Thaha, *Pedoman Perkawinan,* p. 82. Thaha acknowledges that these statistical data are rough and without fully trust-

But if a husband adamantly refuses to grant his wife a repudiation, or is not around to do so, she has only one legal recourse—to go to court—a very limited one compared with her husband's legal capacity to break the marriage at will.

The incidence of divorce cases in the *pengadilan agama* is relatively small compared with conventional *talak* registrations. The number of cases brought to Islamic courts averaged about 22,000 per year until 1957, then rose sharply as new courts were established outside of Java. A plateau of approximately 38,000 new cases per year was sustained between 1959 and 1964, followed by another sharp rise, as table 2 shows. As nearly as one can tell, the growing case load from the mid-1960s is due not only to an increasing marriage-age population but also, possibly, to a slightly widening awareness among women of the uses of Islamic courts. Not all matrimonial cases brought to the courts are divorce actions, so proportions of judicially handled divorces should be lowered slightly, but there is no need for greater precision here.[15] In referring to table 2, though the figures are accepted at face value here for the sake of convenience, the warning is in order that they are probably inflated, sometimes considerably, as a result of the interest of local Islamic courts in demonstrating a high level of activity.

Islamic reformers often propose, as a solution for the divorce problem, to give religious courts rather full control over all divorce actions, following the model of civil judicial intervention of more fully secular states.[16] This would convert the *talak* from a simple administrative procedure into a judicial one, subjecting all divorce issues to judicial determination. The reasoning behind this view is that adjudication supervised by socially concerned and responsible judges must strike a better legal balance between spouses and, at the same time, introduce rational judgment into an emotional arena. Naturally, it is assumed—quite rightly, because of the greater control imposed by judicial procedure—divorce rates would be greatly reduced, redounding

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worthy basis. His book is one of the few, and probably the best, that has tried to deal with the problem of divorce sociologically as well as legally.

[15] The table was compiled from annual statistical reports gathered by the Directorate of Religious Justice, to which I am indebted for copies of them.

[16] See, for example, 'Abd Ad-Nabi Miku, "Divorce in Islam—The Need of Judicial Control," *Islamic Review* (Dec. 1966), pp. 32–35.

TABLE 2. CASE LOADS

	New cases	Decisions	Backlog
1954	24,932	22,462	1,360
1955	21,764	20,272	1,533
1956	22,097	20,752	1,638
1957	29,106	26,964	2,382
1958	34,230	32,130	2,955
1959	38,566	36,396	3,866
1960	37,613	35,023	4,393
1961	38,640	35,692	4,585
1962	38,457	35,985	5,152
1963	38,270	35,959	4,657
1964	42,246	39,436	4,460
1965	44,330	42,788	4,266

to the benefit of marital and social stability. This analysis has been influential in new marriage codes in a few Middle Eastern countries, and should reform legislation ever materialize in Indonesia, Islamic courts may have a much larger role to play; a draft bill of 1961 incorporates precisely such provisions.[17] Judging from the Indonesian case, however, for Islamic courts to perform effectively in controlling divorce requires a major overhaul, not only of court organization and personnel, but also of the orientation toward social function implied by the present Islamic judicial role. What must be understood is that Islamic courts are in fact primarily divorce courts. They are divorce courts, moreover, whose latent functions are only superificially related to explicit purposes of adjudication and control.

Most kinds of administrative (and other) institutions tend to fall under the lasting influence of their clienteles. Whoever deals with them day in and day out is likely at length to have an implicit say in their output. An administrative organization's best chance for even imperfect neutrality is a highly diverse clientele with varied and conflicting interests—questions of disparate power aside. If the clientele is uniform and single-minded, the institution may well wind up serving that group's interests. American national regulatory commissions are an example. But the same is true of courts, at least in noncriminal jurisdictions for obvious reasons. And the more specialized a court, explicitly by law or implicitly by the nature of the interests brought before it, the more prone it probably will be to serve the interests of those

[17] Soedarsono, *Masalah Administratif*, pp. 162–163.

who appeal to it. As it happens, Islamic courts are very specialized institutions.

Defenders of Islamic marriage law usually say that the male right of *talak* is balanced by wives' rights in court.[18] This is not at all true on a scale of facility. But it is true in Indonesia that *pengadilan agama* are peculiarly women's institutions.[19] They do in fact offer wives a way out of difficult marriages, or even merely unpleasant ones. As was argued in our discussion of procedure, this implicit functional service molds the character of *pengadilan agama*. By and large, Islamic judges seem to recognize the social purpose of their role. Occasionally, strict judges will pursue inconsistencies in testimony and make sessions uncomfortable for wives. And it is by no means rare for a wife's plea to be rejected. But confronted so frequently by women who have suffered from unhappy marriages, religious judges tend to be sympathetic and quick to justify divorce, even at times when the plaintiff wife is clearly dissembling or at fault. This characteristic stands out in contested cases as well as those in which husbands do not appear—usually indeed because they have deserted. Popular impressions have it that Islamic courts favor husbands, undoubtedly because Islamic legal rules do so, but in general the opposite bias is more common. The essential reason for this bias is that the clientele and social function of Islamic courts elicit judicial attitudes favorable to wives. It may be that the generally stronger social position of women in much of Indonesia, particularly Java, compared with other Islamic countries, has pushed Indonesian Islamic courts further in this direction than is the case elsewhere in the Islamic world.

In their present state, then, Islamic courts are not very effective instruments for lowering divorce rates, though they do a better job of counseling troubled marriages than administrative registrars. As was pointed out earlier, KUA registrars are also basically ineffective either as a means of control over divorce or as counselors.

Consequently, when an effort was finally made to form a

[18] See Nashruddin Thala, *Pedoman Perkawinan Umat Islam*, p. 69. It needs to be emphasized that Islamic leaders themselves tend to be concerned with the high divorce rate. They constantly point out that the Prophet regarded divorce as an evil and not to be undertaken lightly. But the admonition has evidently had little effect.

[19] Cf. Djamour, *Muslim Matrimonial Court*, p. 147.

marriage-counseling service, it was given a wholly new format with specific functions. The marriage-counseling boards (Badan Penasehat Perkawinan dan Penjelesaian Pertjeraian: BP4—literally, Marriage Counseling and Divorce Settlement Bodies) created in late 1954 were largely the result of the work of provincial KUA directors in Djakarta and Bandung. Initially the idea was formulated by S. M. Nasaruddin Latif of the Djakarta KUA, who evidently had a long interest in marriage problems and counseling possibilities. In 1954 he established a counseling service within the KUA itself to advise disturbed couples, try to find out why they sought divorce, and attempt to reconcile them. In October 1954, the first BP4 was established in Bandung on this model.[20] Although it was led by the KUA director of West Java, board members included representatives of several women's and other organizations. In following years similar boards were established in *kabupatens* throughout Java and more gradually in the other islands; in the beginning, at least, the effort was essentially Java-wide, probably because women's organizations are strongest in Java.

These boards were a response not only to an obvious social problem but also to a political one. The background against which they appeared was filled with activity by women's groups, some of them political party subsidiaries, which were demanding reform of existing marriage law for Muslims.[21] It was also a time of considerable ideological conflict among political parties, and Islam was very much at issue. There is no reason to doubt the professional interest of those who first created the boards, but in an important sense they represented an attempt to take the wind out of the sails of efforts toward legislative reform. Islamic leaders perceived these latter as a challenge to Islam, to which there could be no surrender without admitting the fallibility of the very sources of Islam. So parliamentary demands for new legislation were defeated by Islamic parties, including

[20] Nj. Djunah Pardiaman, "Sedjarah dan Perkembangan BP4," *Penuntun* 14, no. 1 (Jan. 1960): 16–19. Also Vrede-de Stuers, pp. 131–132. Latif was particularly active in these efforts to establish effective marriage-counseling boards and was very much interested in professionalizing the service. See his articles in *Penuntun* 14, no. 12 (Dec. 1960): 4–5; and 15, no. 14 (April 1961): 5–8.

[21] Soewondo-Soerasno, *Kedudukan Wanita,* contains an exciting and impassioned account of these efforts. Along with parliamentary activity, lectures and courses for women were also organized.

their subsidiary women's organizations. But the BP4 was the sort of effort that presented no challenge to Islamic law. On the contrary, it would prove the essential worth of religious law by demonstrating its inherent concern with marital stability and the the protection of women.[22] The origins of the BP4, then, lay in professional concern, interest-group pressure, and rather wider political response.

Though blessed by the Ministry of Religion, which increasingly took them officially under its wing, the BP4 also received support from the Ministry of Social Affairs and drew participants from private organizations. They survived the pressures of poor finances and lack of interest during the last years of Guided Democracy, and it appears now that they will become a permanent part of the marriage-law scene. BP4 services extend to Christians also, and some members of the boards are Christian. But their clientele is of course overwhelmingly Muslim. Members of the BP4 are required to be over thirty, married, knowledgeable about Islamic marriage law, and able to read and write in Roman script.[23] Outside of Djakarta, BP4 often consisted of locally prominent social leaders, both men and women—for example, the wives of *bupatis* serve here and there—and someone from the KUA.

The procedure of the boards was (and remains) simple and direct. Henceforth, repudiations brought to the local KUA for registration were no longer accepted immediately. Rather, husband and wife are sent off to the local BP4 first, delaying registration and validation of the *talak*. Counseling is thus obligatory. The BP4 are most successful in reconciling couples who are not really eager to break up; the husband too easily resorted to *talak*. Many might well reconcile on their own, but some would not. In BP4 hearings board members talk with couples about the history and problems of their marriages, give advice, and bring pressure to bear to try again. In some areas the social authority of board members lend them considerable influence, particularly over lower-class couples, and social familiarity gives them a

[22] Mrs. Soewondo-Soerasno sensed the diversionary effects of the BP4 and, though she praised the effort, gave it short shrift. "But the evil situation at present can only be overcome by a Marriage Law which will protect women, especially with respect to the problems of polygamy and divorce." Ibid., p. 162.

[23] Vrede-de Stuers, p. 132.

certain amount of leverage on their own class cohorts. In addition, the contacts of board members in an influential social-political-administrative stratum often lends them opportunity to work out problems for the people who come before the boards. For example, in one West Javanese *kabupaten* the *bupati* himself was chairman of the local BP4, though he likely attended meetings only rarely, and his wife was a member.

> At dinner the [*bupati's*] wife brought up a matter with him involving a divorce. . . . He explained that the woman, divorced by her husband, owns some land which her husband refuses to give back to her. He uses it, and every time she comes to try to work it, he threatens her with a stick. So she is asking for help and the problem has reached the *bupati*. He said there is little sense trying to order the man off the land, for he will continue to threaten his ex-wife. He wants to *mendamaikan* [conciliate] the matter and told his wife that he has already told the *tjamat* in the area to try to work out an agreement between the man and his ex-wife. His sympathies are all with the woman, who has children, for she needs the land for her livelihood.

The success of the BP4 varies. In some places, like Semarang City and Djakarta, the divorce rate has noticeably declined, but in other areas it has hardly declined at all.[24] Much depends on the consistent interest of board members, some professionalization of staff, and cooperation by the local KUA. The BP4 cannot City and Djakarta, the divorce rate has noticeably declined, but they remain an important institutional innovation within the context of substantive legal rules whose effect can be changed even if the rules themselves are not. Indeed, given the general inertia of conceptions of role and function in legal institutions, it may well be that legislative reform without bureaucratic and institutional innovation—perhaps the creation of altogether new institutions—cannot hope for more than minimal efficacy.

LAW OF DIVORCE IN ISLAMIC COURTS

Even without major institutional innovations, change can and does occur, nevertheless. In legal history, as in political and social history of which it is part, there are myriad examples of change, usually gradual change, wholly within the terms and context of an original institution. An old concept may be re-

[24] For a recent report on the successful work of the BP4 of Djakarta, see the daily *Berita Buana*, Sept. 28, 1971.

TABLE 3. MATRIMONIAL CASES

	Nikah	Talak	Rudjuk	Ta'lik-talak	(%)	Fasach	(%)	Sjiqaq	(%)	Mahr	Nafkah	(%)	Other
1954	no data	700	88	11,204		8,697		132		61	532		490
1955	no data	—	—	—		—		—		—	—		—
1956	no data	—	—	—		—		—		—	—		—
1957	3,641	1,173	38	11,726	(43.48)	7,731	(28.67)	180	(0.66)	33	351	(1.30)	2,091
1958	7,442	1,291	209	12,627	(39.29)	7,251	(22.56)	172	(0.53)	9	384	(1.19)	2,745
1959	8,778	1,422	111	15,178	(41.70)	7,807	(21.45)	164	(0.45)	12	471	(1.29)	2,465
1960	9,193	2,429	316	15,645	(44.67)	7,338	(20.95)	181	(0.51)	24	548	(1.56)	1,081
1961	9,788	2,644	293	15,984	(44.78)	7,267	(20.36)	190	(0.53)	28	554	(1.55)	1,171
1962	9,850	1,999	295	16,310	(45.32)	7,179	(19.94)	179	(0.49)	30	552	(1.53)	1,242
1963	9,932	2,154	315	15,913	(44.25)	7,452	(20.72)	181	(0.50)	25	592	(1.64)	1,179
1964	8,358	3,246	907	12,965	(32.87)	9,984	(25.31)	350	(0.88)	23	1,371	(3.47)	1,361
1965	8,548	3,563	1,219	15,336	(35.84)	10,621	(24.82)	639	(1.49)	118	1,733	(4.05)	1,945

SOURCE: These statistics were compiled from reports to the Directorate of Religious Justice. About 95 percent of the first instance Islamic courts reported. But the statistics are by no means reliable, because of a tendency to inflate case-load reports. After 1966, evidently following warnings about statistical reports, the numbers changed considerably. However, this table can be used to demonstrate some proportions. Post-1965 statistics are not included because they are even more incomplete, and because the pressures on statistical reporting are probably felt too unevenly to offer even the advantages of general proportionality. In this table the percentage figures are of the total number of decisions reported for the year, as presented in table 2. Percentages are given in this table only where they are relevant to our discussion. No breakdown is available for the category Other.

discovered for new purposes, or a common concept may be put to novel uses, or men of new interests and attitudes may give new meanings to old organizations. The main disadvantage of such a process, at least for some kinds of change interests, is that it normally takes so long. But for the institutions involved, it is frequently the safest process, because gradual adaptation to new demands is usually possible and not too threatening, and it promotes survival.

Indonesian Islamic courts have to some extent undertaken this sort of change, though it is barely evident to the naked observation. The gradual acceptance of more and more conditions in the *ta'lik-talak*, which Islamic courts have little difficulty approving, is evidence of this. And there is other evidence that will be taken up in this part of our discussion. For the most part, however, this brief survey of the substantive marriage-law work of the courts will indicate the range of actions available to distressed wives and to the judges who hear them. It should be kept in mind, as the preceding discussion emphasized, that these are divorce courts. Judges are not, by and large, reformers. Indonesian Islamic judges, moreover, tend to act in terms of a role very much influenced by their primary clientele, unhappy wives. It is not surprising, consequently, that while Islamic judges often work hard at reconciling estranged couples, they are equally interested in finding ways to facilitate divorce when it seems necessary.

A variety of grounds for divorce is available to women in the *pengadilan agama*. No attempt will be made to cover them all or to present a review of the Islamic law of marriage. Rather, only the most common issues of marriage and divorce will be taken up in our discussion, based not on legal texts but for the most part on actual case material from Indonesian Islamic courts.[25] Table 3 indicates the number and percentage of cases by category of legal issue and decisional grounds between 1954 and

[25] On the substantive family law of Islam, see Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1950). For material on Sjafi'i law in Indonesia I have relied on Th. W. Juynboll, *Handleiding tot de Kennis van de Mohammedaansche Wet,* 1st ed. (Leiden: Brill, 1903); Thaha, *Pedoman Perkawinan Umat Islam;* H. Aminoeliah, *Pedoman dan Hukum2 Islam tentang Nikah-Thalak-Rudjuk* (Djakarta: Pustaka Islam, 1960); Soewondo-Soerasno, *Kedudukan Wanita;* and, in part for comparative purposes, Ahmad Ibrahim, *Islamic Law in Malaya.*

1965. In this table it cannot be made clear from available data just how many divorces are denied; it is generally agreed, however, that the proportion is quite small.

Nikah (Marriage) and Fasid (Annulment)

A large number of *nikah* problems brought to Islamic courts are requests for official validation of marriages, usually because couples either never had marriage certificates or have lost them. Difficulties arise in connection with pensions, inheritance, legitimacy of children, and so on. Such requests are handled easily and flexibly in the courts. Testimony by two witnesses that a marriage took place according to required procedure—a proper *wali*, at least two witnesses, payment of dower (*mahr*)—is all that is needed for validation. But if two witnesses are not available, a statement under oath by a mature woman that she was indeed married, as her husband claims, is sufficient.[26]

There are more complex issues of marriage validity, however, in which Islamic courts may contribute to personal tragedy or help to prevent it. In such cases Islamic law and the religious court frequently stand as an alternative to local adat legal institutions, providing a way out of constricting traditions for persons who suddenly find themselves in violation of them. The following case came before an Islamic court on the island of Lombok in December 1963.

> BR, aged twenty, a teacher in an Islamic school in East Lombok, told the court that she was taken by elopement (*pemerarian*,

[26] Decisions of the Islamic court of Palembang, April 2, 9, and 16, 1962; Makassar, May 4, 1964. Much of the case material reported in this chapter comes either from my own observation or from decisions sent by the religious courts to the Directorate of Religious Justice. I am grateful to the directorate for permitting me to use these reports. I have also relied more than considerably on Notosusanto, *Organisasi dan Jurisprudensi Peradilan Agama di Indonesia* (Jogjakarta: Jajasan Badan Penerbit Gadjah Mada, 1963), in which many otherwise unavailable decisions by Islamic courts are recorded along with Professor Notosusanto's careful comments. Professor Notosusanto's book is the only one of the sort in Indonesian, and his long contact with the Islamic judiciary makes it all the more valuable. Other relevant material covering some of the same ground can be found in J. Prins, *Adat dan Islamietische Plichtenleer in Indonesie* (The Hague and Bandung: van Hoeve, 1954). For prewar Islamic jurisprudence, see also J. H. van de Velde, *De godsdienstige rechtspraak in Nederlandsch-Indie* (Leiden, 1928); *Adatrechtbundels* (The Hague: Martinus Nijhoff, 1911), passim, and Juynboll, *Handleiding*.

ritual kidnapping by a suitor, usually by mutual consent, with marriage as the object) according to the adat of the Sasak people, by Hadji BI, a student from the Djakarta State Institute of Islamic Religion (I.A.I.N.). After the *pemerarian*, they sent an NTR registrar to ask her father to act as her *wali-nasab*, but he refused. They then asked a local KUA to appoint a *wali-hakim*, but the head official refused and would not perform a marriage for them. (The KUA official may indeed have feared the anger of the wife's father and did not want to get involved in a family fight, especially if the family was a locally powerful one.) So the girl and her suitor decided that their only chance was to ask the help of Hadji ZM—the witness in this case—to marry them as a *wali-tahkim*, a *wali* appointed by the parties themselves in special circumstances. Hadji ZM (whose idea it was, evidently) did so, and on the same day they came to the *pengadilan agama* to ask whether their marriage was valid. Hadji ZM, thirty-one, himself a teacher in the I.A.I.N. of Djakarta, said that he was willing to assume responsibility for marrying the couple as a *wali-tahkim* on the basis of an authoritative opinion in the volume of *Bugijatul Mustarsjidin*.[27] The court accepted the authority of this view and declared the marriage valid.

Had the court not done so, the couple might have fallen into serious trouble with the girl's family, or at least they could not have married. As it happened, they were probably fortunate in having Hadji ZM for a nearby friend, who knew a way out of their predicament and could give the court adequate (perhaps merely impressive) grounds for allowing their marriage.

Marriages can be disallowed or annulled for several reasons. A prominent one is the illegality of the ritual guardian or *wali* (*wali-nikah*). Among clear causes of annulment is the rule that a further related male kin (e.g., a brother) cannot displace a closer related male kin (a father) as *wali-nasab*, and a foster father cannot act as *wali-nasab* for his adoptive daughter.[28] Furthermore, a *wali-hakim* can never displace an avaliable *wali-nasab*. With the rationalization of Islamic administration since the revolution, the obligation to use officially appointed *wali-*

[27] The authorities cited by Islamic courts for their decisions are early Sjafi'i texts and commentaries as well as the Koran itself. Standard maxims from a few texts are used in support of decisions in the most common kinds of cases throughout the archipelago.

[28] Notosusanto, *Organisasi*, pp. 47ff.

hakim has given the courts (and a few women) important grounds for annulment. Here religious courts serve a critical control function in support of administrative authority. *Wali-hakim* must be appointed by the local KUA, and usually will be the director of the *ketjamatan* KUA himself. A penghulu in the KUA cannot act as a *wali-hakim*, for example, because a penghulu is not a *hakim* or *kadi* in the meaning of the Sjariah; this administrative rule holds, even though a penghulu may be higher in rank than a KUA director.[29] In a typical case from Palembang, the plaintiff wife argued that the *wali-hakim* in her marriage was not a legally vested NTR registrar (from the KUA), and the court agreed that her marriage was therefore invalid.[30]

Occasionally Islamic courts apply rules of legal propriety so formalistically that hardship and personal distress must result. Most judges are flexible enough to avoid this fault, but the rules, based as they are on religious obligation, lend themselves to fanatic adherence by particularly rigid or merely very insecure judges. Notosusanto reports this case from the *pengadilan agama* of Bodjonegoro (East Java) in 1961:

> In 1943 a girl of twelve years was married, her brother acting as *wali*. Because the girl was not yet of age (*baligh, dewasa*) her marriage required a *wali-mudjbir*—one who is guardian for minor daughters. According to Sjafi'i doctrine, a brother is not a *wali-mudjbir;* only the father or grandfather is so designated. Eighteen years later the couple needed a marriage certificate, because the original one had disappeared and the local KUA had no duplicate of it. They went to the *pengadilan agama* for a declaration that they were indeed validly married. But on examination the court discovered that, although a marriage ceremony had been performed, unfortunately the girl was underage at the time and was not represented by a *wali-mudjbir*. The marriage was therefore ruled invalid.[31]

Notosusanto points out that the grief of this couple could have been avoided if the court had merely been willing to rely on Hanafi doctrine, which regards all *wali-nasab* as *wali-mudjbir*. (Many judges would have ignored the original error altogether.) Indonesian Islamic judges, however, have so far refused to consider anything of the sort. While in much of the rest of the

[29] Ibid., pp. 50–51.
[30] July 23, 1962.
[31] Notosusanto, *Organisasi*, p. 48.

Islamic world a mixture of the four major *madhab* (schools of legal doctrine) has long since been acceptable, in Indonesia Sjafi'i still excludes all others. Clearly this promotes judicial inflexibility. Or at least it means that flexible judges get little help from available doctrinal sources. Instead they must search the traditional Sjafi'i texts for manipulable rules when they need them.

Many substantive prohibitions may lead to annulment of marriages. When such violations are brought out in court, the marriages are declared *fasid*, annulled, from the start, as if they had never occurred at all. Among grounds for rendering a marriage *fasid* are violations of kinship restrictions, which include, *inter alia*, a prohibition against polygamous marriage with two sisters; polyandry, which sometimes occurs unwittingly as the result of an incompleted divorce action; polygamous marriage with more than four wives, in which case the fifth and succeeding wives are not validly married; remarriage by a divorced woman during her *'iddah*, that is the period (one hundred days) of three menstruations from the time of divorce; *mut'ah* marriages, contracted for a predetermined time (usually) but with every intention of a divorce, the normal purpose of such a marriage being to evade other restrictions—that is, against a man and woman remarrying after a definitive divorce (*talak ba'in besar*) between them unless the woman first marries someone else and is divorced by him.[32]

A major difficulty with annulment procedures is that Islamic courts have no jurisdiction over custody and, for all intents and purposes, support of children who may be involved. For example, a pregnant woman is divorced and then marries another man. By law her *'iddah* period extends through the birth of the child, which goes by the name of its father. (This is the purpose of the *'iddah* restrictions, any children born during the *'iddah* being legally regarded as the offspring of the former husband.) Her remarriage is therefore invalid, and any Islamic court in Indonesia will declare it *fasid*. But the court has no authority to consider the child's fate, which will be made difficult by the annulment of the woman's second marriage and by lack of support from either of her former husbands. Generally, indeed, children get short shrift in the religious courts, because the

[32] Ibid., pp. 55–66.

family-law competence of the courts is too narrowly defined and because, partly in consequence of this narrow limitation of competence, Islamic judges themselves constrict their concern.[33]

Talak (*Repudiation*)

When a man repudiates his wife, he may take her back (*rudjuk*) during the *'iddah* period unless there have been three *talak* (over a period of time or all at once) or the *talak* (first or second) has been accompanied by a payment from the wife called *'iwad*. This *'iwad* is essentially a payment from the wife to the husband for the *talak*, making it final and irrevocable, and may take the form of money, goods, or relinquishment of rights by the wife over dower, support, or property.[34] An *'iwad* may be implied, as the courts have often ruled, when a wife merely agrees that she will make no demands for support during the *'iddah* period. The effect is to prevent *rudjuk*, converting a first or second *talak* into a final divorce, which is called a *talak ba'in ketjil* or, literally, "minor final divorce."

The *talak ba'in besar* ("major final divorce") results from the third *talak*, or three *talak* all at once, subsequent to which the husband can neither *rudjuk* his former wife nor even marry her again unless she has undergone an intervening marriage. In a case in South Kalimantan, the Kerapatan Qadi of Barabai declared *fasid* a marriage between a couple after the husband had already repudiated his wife with three *talak*.[35] The only way out of such a dilemma is for the woman, after her *'iddah* period is done, to marry another man—called a *muhallil*, "one who makes something valid or clean (*halal*)." She must have intercourse with this man and then be divorced by him. Otherwise, if of course it can be proven, the marriage would be *mut'ah* and illegal. Notosusanto reports a case from Tjirebon (north coast, West Java) in which a divorced woman married another man and stayed with him three months before he divorced her. After

[33] Ibid., for examples of annulments that place children in difficulty. Notosusanto frequently mentions the unfortunate consequences of such cases.

[34] Ibid., pp. 67ff. Also Prof. T. M. Hasbi Ash-Shiddieqy, *Hukum Islam* [Islamic law] (Djakarta: Pustaka Islam, 1962), pp. 327ff. Ash-Shiddieqy's work is an important one, for it is the only book in the Indonesian language that deals with all four major Sunni legal doctrines inclusively.

[35] Notosusanto, *Organisasi*, p. 69.

her *'iddah* period was over, she remarried her first husband. For some reason she and her husband came to court, where she admitted that she had never had intercourse with her second husband. The court thereupon declared her new marriage *fasid*.[36]

Occasionally a man who has repudiated his wife three times simultaneously, say before a local NTR registrar, will regret it and want to convert the three *talak* into a single first *talak*. Courts normally rule that his initial precipitous action stands.[37] But if a *talak* has not been expressed clearly, if for example a man tells his wife to leave but does not pronounce a *talak*, a court may assume that it is implied (*talak kinajah*) but may also inquire into the true intentions of the husband in order to make the issue clear.[38]

Rudjuk

Few *rudjuk* cases come to the Islamic courts, as is evident from table 3. But those that do sometimes illustrate difficult problems in the implementation of traditional Sjafi'i rules.

These rules are clear on the point that a man may take his wife back (*rudjuk*) after a repudiation during the time of her *'iddah*, as long as his repudiation permits *rudjuk—talak radj'i* in contrast with *talak ba'in*. After *'iddah*, divorce is final, and if the couple wish, they must marry again from scratch. In 1962 the *pengadilan agama* of Palembang ruled that a woman who had menstruated three times since her husband's *talak* could not be taken back (*rudjuk*) by him.[39] If a wife has paid her husband an *'iwad* upon his *talak*, no *rudjuk* is permitted. Often, indeed, wives insist on paying an *'iwad* of some kind precisely in order to avoid *rudjuk*. In 1958 the religious court of Rembang (Java) declared *fasid* the *rudjuk* action of a man who had earlier divorced his wife and accepted an *'iwad*.[40]

The major difficulty with *rudjuk* is that a former wife does not have very much to say about it, unless she has had the presence of mind (assuming she desires divorce) to insist upon paying an *'iwad* at the time of repudiation. It sometimes happens, in fact, that a woman simply does not know that her former husband has taken her back; in the meantime she may have married someone else after her *'iddah*, only to have this marriage declared

[36] Ibid., p. 69. [37] Ibid., pp. 68–69. [38] Ibid., p. 71.
[39] April 9, 1962.
[40] Notosusanto, p. 72. Decision of Feb. 5, 1958.

fasid on suit by her first husband. Moreover, as long as the husband has expressed his *rudjuk* before two witnesses, it is valid even though he has not told his wife nor reported the *rudjuk* to a local KUA registrar. In order to correct this situation, in the late 1930s and again in Law 22/1946 fines were imposed on husbands for not informing registration officials of their intent to take their wives back after a *talak*. The fines were (and are) small, however, and ineffective. In 1955 a regulation (No. 1, June 23, 1955) of the Minister of Religion required NTR registrars to order men to inform their estranged wives of *rudjuk* actions and, furthermore, required registrars also to inform the wives within one week of *rudjuk* registrations.[41] Even so, unfortunate *rudjuk* cases evidently still occur. And when they do, a wife being ignorant of her former husband's decision to take her back, the courts will usually hold in favor of the husband, for his decision is valid by Sjafi'i rules despite the violation of national laws and regulations. Occasionally, however, even here the religious courts' essentially pro-wife posture comes to the fore with some help from legal formalism. Notosusanto reports a case in which a wife distinctly did not want to be taken back by her husband after a first *talak*. Fortunately for her, it happened that her husband had not pronounced his *rudjuk* correctly: instead of saying "I *rudjuk* you" he inserted the future indicator *akan*, "I will *rudjuk* you." The court therefore ruled the *rudjuk* invalid.[42]

The same formalism, however, may work against a woman. Unlike Hanafi and Hanbali rules, Sjafi'i doctrine does not recognize an implied *rudjuk*. In another case mentioned by Notosusanto, a man repudiated his wife, but before her *'iddah* was completed he had intercourse with her and thereafter lived with her for seven years and produced three children. She pressed him to get a *rudjuk* certificate, but for years he didn't. At length he went to the *pengadilan agama* in Magelang and requested that he be regarded as having taken his wife back by valid *rudjuk*. The court refused, stating that the couple had not been married since his talak seven years earlier, for he had never explicitly pronounced a *rudjuk* in clear form. In other words, he had to say it. The Mahkamah Islam Tinggi upheld the lower court's decision. In a comment on this case Notosusanto says, "Thus here we

[41] Ibid., pp. 74–75.

[42] Ibid., p. 76. Decision by the Islamic court of Djombang (East Java) Oct. 15, 1956.

see again that most Indonesian ulamas still feel bound exclusively by the Sjafi'i *madhab*, even though better decisions would result if they were willing to follow another *madhab*. They are less progressive than the ulamas of Egypt, who, if necessary for the sake of a more satisfactory decision, do not hesitate to rely upon a *madhab* other than the one they usually embrace." [43]

Ta'lik-Talak

A glance at table 3 will show that this category accounts for the largest proportion of divorce actions. Pronouncement by the bridegroom of a conditional divorce for clearly stated cause obviously makes the matter fairly simple in court, as long as the wife can demonstrate a violation with appropriate witnesses. Most *ta'lik-talak* cases go through the courts with amazing speed; in one court session I observed, the average time per *ta'lik-talak* was about ten minutes. Once a violation of a promise by the husband is proved, the result is a single talak, which the wife may convert into a *talak ba'in ketjil* (no *rudjuk*, but a new marriage is permitted) by paying a small *'iwad*. (As the *ta'lik-talak* formula now provides, this payment is received by the court on behalf of the husband and is supposed to be used for social works.) The doctrinal basis of nearly all *ta'lik-talak* decisions is a maxim from the sixteenth-century commentary *At Tahrir* by Zakaria Al Anshary, edited by Asj Sjarqowi (d. 1812): "Whoever makes his *talak* dependent upon an action, then the *talak* occurs with the existence of that action, according to the original pronouncement" (II, 302).

The standard formula of the *ta'lik-talak*, proposed by the Ministry of Religion, is as follows:

> Having signed the marriage contract (*akad nikah*), I ——— bin ——— promise sincerely that I will fulfill my obligations as a husband and will live amicably with my wife, named ——— binti ——— according to the teachings of the law of Islam.
>
> Furthermore I hereby pronounce the *ta'lik* formula (*sighat ta'lik*) with regard to my wife as follows:
>
> If ever I;
>
> (1) Leave my wife for six months consecutively, unless I am performing a state responsibility,
>
> (2) or I do not give her obligatory support (*nafkah*) for three months,

[43] Ibid., pp. 76–77.

(3) or I maltreat my wife physically,

(4) or I neglect my wife for six months consecutively,

Then, should I violate any one of these promises, and my wife refuses to acquiesce and so charges before the Pengadilan Agama or similar court or other agency competent to deal with this accusation, and the accusation is upheld and accepted by the court or other instance, and my wife pays 2.50 *rupiah* as an *iwadl*, my first *talak* falls upon my wife.

To the court and/or instance mentioned above which examines and decides upon the accusation of my wife I give authority to accept the *iwadl* money and to contribute it for charitable purposes.[44]

The grounds for most *ta'lik-talak* cases seem to be desertion, and consequently the husband does not appear in court. However, there are also numerous charges of lack of support and cruelty. Some typical cases follow:

TM claimed that her husband, MA, was away for fifteen months. MA was not in court. Witnesses supported TM's claim. MA had pronounced the *ta'lik-talak*, and the court ruled that a first *talak* must fall on TM. (It was a *talak radj'i*, for TM did not pay an *'iwad*.) [Palembang, April 2, 1962]

The plaintiff wife wanted a divorce because her husband gave her no support for a year and a half. Her husband, in court, admitted that he did not give her support, because he was poor and could not. The court ruled that the *talak* must fall. [Palembang, May 10, 1962]

The plaintiff wife demanded a divorce because her husband left her for six months without maintenance. Moreover, she was no longer willing to be one of several wives; her husband could not support her properly because he must support others too. She asked the court to validate the *talak* which the defendant promised in pronouncing the *ta'lik-talak* on March 31, 1956. The defendant husband was not in court, though he was summoned. The wife won her *talak*. [Makassar, May 11, 1964]

The plaintiff wife, thirty-five, and her husband, fifty,

[44] Soedarsono, *Masalah Administratif*, p. 236, for the original from which this was translated. Also Vrede-de Stuers, pp. 170–173, for another version of the formula and the proposed formula by the women's organization Perwari. I have used the translation in Vrede-de Stuers at p. 171 to assist in my own translation above.

peasant farmers, were both in court. She wanted a divorce because he always berated her and never trusted her to do anything in their home. They were married about two years ago before the NTR registrar in Tjakranegara. The husband pronounced the *ta'lik-talak* according to the Ministry of Religion form. They lived together for a year, then her husband left her and she went to live with her parents. Only once did her husband ask her to come home. The defendant husband admitted that he pronounced the *ta'lik-talak*. He claimed that they had lived together for four months, then his wife went back to her parents; though he often asked her to come back, she refused. So he tried no more to persuade her to join him for ten months. The court ruled that the *talak* must fall, as the husband ignored his wife for ten months. [Lombok, June 20, 1963]

SMK, twenty-eight, and her husband MS, thirty-five, a trader, were both in court. She insisted on a divorce, claiming he violated the promises of his *ta'lik-talak* pronounced in December 1961. (The conditions he undertook were different from those in the conventional formula.) Apart from denying her material and spiritual support, the conditions of the *ta'lik-talak* he violated were art. 1—he beat her—and art. 2—he took a second wife and chased SMK away. MS admitted he hit her, but said it was unintentional, and he sent her away, but it was not really in his heart to do so. He claimed he took another wife before he had actually made the promises to SMK. SMK had no witnesses, but the court ruled that MS's own testimony proved her case that he violated his promises to her. The *talak* was therefore granted. [Palembang, June 26, 1962]

IS, thirty, and AS thirty-five, peasants from a village in East Lombok, were in court together. IS claimed that eleven months ago AS beat her until she bled, and she left him to live with her parents. He had sent her no support since then. When they were married, AS pronounced the *ta'lik-talak* to the effect that should he ever beat her until blood appeared, and she objected, his talak would fall. AS admitted he beat his wife because she was recalcitrant and would not take his advice. But he denied that he ever pronounced the *ta'lik-talak* in the way she claimed. (The words of the promise—"until she bleeds"—are unusual.) But a penghulu from their village said on oath that AS did make this promise. Two additional witnesses, another penghulu and a village official, told the court that AS did beat his wife and that she bled. The court ruled in favor of the wife, and the *talak* fell. [Lombok, December 14, 1963]

One legal problem that occasionally arises in *ta'lik-talak* cases is that of *nusjuz*—disobedience on the wife's part, usually leaving the conjugal home without her husband's permission. Islamic courts sometimes rule that *nusjuz* cancels a husband's promise to give support and the like. In order to get around this limitation, according to Notosusanto, in some areas of the country the words "even though *nusjuz*" were appended to the *ta'lik-talak* pronouncement.[45] Jurisprudence on this point is not consistent. In two decisions by the Mahkamah Islam Tinggi, in 1950 and 1958, it was held that *nusjuz* cancels out *ta'lik-talak* obligations. But in another decision of 1950 the MIT ruled, on the contrary, that *nusjuz* does not prevent a talak from falling, that it is indeed unrelated to a conditional talak. Notosusanto, who favors this latter position, points out that it is important precisely because the prevailing Ministry of Religion *ta'lik-talak* formula does not contain the words "even though *nusjuz*." Consequently, if a wife feels compelled to flee her husband, she cannot get a divorce and remarry except by means of the *sjiqaq* procedure (see p. 169).[46]

Fasach

Fasach is judicial dissolution of a marriage for cause stipulated in Islamic law, in this case the Sjafi'ite texts, and does not depend on any promise by the husband. The most common grounds are the husband's insanity, leprosy, elephantiasis, impotence, impoverishment, and failure of proper support. Other causes are also possible, however. It is essential in *fasach* actions that the wife not be *nusjuz* and that she prove the cause.

[45] Notosusanto, p. 92.

[46] Ibid., Many judges do not go easy on *nusjuz*, particularly in those parts of the country where wifely obedience is regarded as a critical virtue, or where anxieties about adultery pervade family culture, as in Atjeh. Judicial rejection of demands for divorce are often based on *nusjuz*. The following case from Palembang is typical. The wife, nineteen, accused her husband of neglecting her and not giving her maintenance for six months. He asked her to come home after she bore a child, but she did not want to do so. Her husband, twenty-eight, told the court that his wife went to stay with her parents after she became pregnant, but then refused to come home after she gave birth. She told him she wanted nothing more to do with him. He gave her *rupiah* 400 as support. The court held that the wife's claim must be rejected because of *nusjuz*. (Palembang, May 24, 1962.) On Islamic legal restrictions on the movement of wives, see Thaha, *Pedoman Perkawinan*, pp. 98–99.

> The plaintiff wife requested a *fasach* divorce. After she and her husband had lived together nineteen years, he contracted a contagious disease. . . . His fingers were already rotten. (The disease is not actually mentioned by name.) Moreover, her husband often beat her. The court dissolved the marriage on grounds of the husband's illness. [Djakarta, December 15, 1964]

> Nn, forty, asked for a *fasach* divorce because her husband, LSA (a Chinese), whom she had married in 1942, returned to China in 1960; he left her without support. Nn's witnesses informed the court that LSA had left her and that he did not pronounce a *ta'lik-talak* at the time of their marriage. The court granted the *fasach* divorce, quoting a maxim from the volume *Qawanin Sjar'iyah* to the effect that many ulamas have upheld *fasach* divorces for women when the whereabouts of their husbands was unknown. [Lombok, October 24, 1963]

When a husband has left his wife without property or support, the courts normally grant a *fasach* divorce. But on appeal the MIT, at least, may insist that the lower court examine the facts to make certain that there is in fact no means of support. Similarly, on a claim of financial incapacity by the wife, the appellate court (again the MIT at least) requires an investigation into the facts of the husband's poverty. If the husband is capable of providing support, and has in fact provided a house or clothes or other goods which the court considers adequate, then the wife is obliged to follow and obey her husband.[47]

Claims for *fasach* divorce on grounds other than those mentioned above are not uncommon, though it is not uncommon for them to be rejected either. Notosusanto reports a case in which a sixteen-year-old wife, given in marriage when she was five, sued for divorce because she was unhappy with her husband. Her witnesses, including her own father, supported her testimony in court, and she was granted a *fasach* divorce because she was underage at the time of her marriage.[48] The *pengadilan agama* of Gresik granted a *fasach* divorce to a woman because her husband had failed to give her a dower payment (*mahr*, *maskawin*), in the paltry sum of five *rupiah*, not because he did not have the money but apparently because he forgot. In this case the MIT

[47] Notosusanto, p. 87.

[48] Ibid., p. 89. Decision by the *pengadilan agama* of Kebumen (Java), June 29, 1959.

quashed the decision of the lower court and ruled that a *fasach* divorce could not be granted under such conditions.[49]

Table 3 indicates that the proportion of *fasach* divorces rose in comparison with *ta'lik-talak* cases during the early 1960s. The volume of *ta'lik-talak* cases, indeed, remained about the same, while the total number of decisions rose considerably. Because the time span covered by table 3 is so short, it is hard to judge whether these statistical variations represent a real trend. If they do, a tentative explanation is in order. It may be that the increase in *fasach* cases is the result of a growing independence of women, or at least of an increment of aggressiveness on the part of women, along with a sharpening awareness of the potential utility of Islamic marriage rules as they are applied in Indonesia, particularly among women who earlier were not fully familiar with the *ta'lik-talak* or who simply did not want to insist upon it. Even women whose husbands did pronounce a *ta'lik-talak* in some form may be beginning to realize that they have more than just this one legal route to divorce. Information campaigns by women's organizations, and quite possibly intercession by Islamic judges themselves, could well be contributing agents to an expanding consciousness of available rights for women. Whether or not this is so, it is critically important that women seem to be more willing than before to press whatever rights they have.

Chul' (*Chulu, Kulu*)

By *chul'* a wife buys her way out of marriage with a frequently substantial *'iwad* payment. It has the advantage of being dependent neither upon the husband's stipulated promises nor upon predetermined causes in the traditional texts; it has the disadvantage of being costly. It depends of course upon the consent of the husband to be bought off. Without his consent no *chul'* is possible. The *chul'* is an ancient procedure, having been incorporated into Islamic law from pre-Islamic Arab custom, and its origin is essentially a repayment of the bride-price or dower.[50] Something of this relationship still obtains, as is evident in the case reported below, but basically the *chul'*, as it now is used in

[49] Mahkamah Islam Tinggi, Decision no. 80/1957, Nov. 21, 1957. I am grateful to the staff of the MIT for permitting me to copy this and other decisions of the court.

[50] Juynboll, *Handleiding*, p. 211.

Indonesia and Malaysia, is the negotiable price of a *talak*.[51] Occasionally vindictive or merely greedy husbands demand truly exorbitant payments from their wives in exchange for a talak—which may result in no divorce at all. It is not at all rare, however, for a more or less reasonable bargain to be struck.

> MH, seventeen, and her husband, IM, twenty, peasant farmers, were both in court. MH told the court that IM had chased her from their house two years and three months ago and has not given her support since. He once came to bring her back, but she refused. She wants a divorce. IM, however, said that MH's testimony was not true. He claimed that she ran away without his permission and that he tried to get her to come back four times, but she didn't want to. IM thereupon said that he was willing to divorce MH if she was willing to redeem the *talak* for 5,000 *rupiah*. MH admitted the truth of IM's statement. She said further that she no longer wanted him and was prepared to pay him 5,000 *rupiah* for the *talak*. This was agreed and she paid IM in front of the chairman of the *pengadilan agama*, whereupon IM pronounced the *talak*. [Palembang, June 14, 1962]

The price must be agreed upon by husband and wife. In 1939 the MIT advised all Islamic courts in Java and Madura to order the wife to make a cash payment to her husband in court and the husband to pronounce the *talak* immediately afterward.[52] The purpose of this policy was to avoid difficulty later on in case a *talak* was pronounced but the promised payment was not made. A suit for payment would have to go to a civil court. The few *chul'* cases I have notes on indicate that the payment, often negotiated in court, is made before pronouncement of the *talak*. With this payment, the wife is no longer subject to *rudjuk*.

Sjiqaq

Sjiqaq means, literally, "break-up," and it refers here to a condition of marriage so bad that it is nearly futile to try to

[51] Aminoeliah, *Hukum2 Islam*, pp. 77ff, where the *chul'* is regarded as a repayment of expenses incurred (*ganti kerugian*); and Ibrahim, *Islamic Law in Malaya* (n. 3 above), pp. 210–213. The *chul'* appears to be subject to regulation and control by *kathi* courts in some Malaysian states more so than in Indonesia, partly because of more specific legislative provision in several Malaysian states. In Indonesia there is very little legislation on substantive rules of Islamic family law.

[52] Notosusanto, p. 102.

patch it up. Although the way Islamic courts now deal with it is properly a matter of procedure, it seems more sensible to discuss it here by way of contrast with other judicial routes to divorce. It is perhaps the most interesting development in the divorce work of Indonesian Islamic courts since the 1930s. Table 3 shows that *sjiqaq* cases doubled in number from 1963 to 1964 and tripled from 1963 to 1965. If this "trend" was consolidated in succeeding years, it may indicate an important broadening of the means available to wives to escape unhappy marriages. The volume of *sjiqaq* cases is obviously not at all substantial yet, and may never become so, but it does fill some legal gaps on behalf of married women.

Assuming a wife cannot talk her husband into a divorce, or buy one from him, or prove cause for a *fasach* dissolution, or show clear violation of a *ta'lik-talak* condition, *sjiqaq* is her last recourse short of cataclysm. The *sjiqaq* process is basically a formal mediation procedure, brought into play when it is perfectly clear to Islamic judges that a couple before them is irreconcilable, but the wife has no grounds for divorce and, usually, the husband is adamantly opposed to one. In such cases the court may appoint a committee of two *hakam,* arbiters, one for each spouse. The basis of this proceeding is a maxim in the Koran (Sura IV, Women, 39) which says that in case of a breach between man and wife, a representative (*hakam*) from the family of each should be appointed to work out a reconciliation. Before the 1930s Indonesian ulamas and religious officials, following dominant Sjafi'ite interpretations, held that these *hakamain* were only representatives of the parties and could do no more than give nonbinding advice to married couples. Evidently, however, as more wives began to resort to *riddah*—apostasy from Islam[53]—as a means of forcing divorce, and perhaps as Islamic

[53] In Islamic law apostasy by the husband gives his wife grounds for a *fasach* divorce. Apostasy by the wife makes the divorce automatic, though an *'iddah* period still obtains during which, if the wife returns to Islam, the marriage becomes valid again. *Riddah* caused a good deal of consternation in Islamic circles through the early 1950s and occasionally still crops up here and there in a family-law context, never failing to upset Islamic religious circles. Until the late 1930s women who wanted divorces, but had no obvious grounds, often went to an Islamic court to declare themselves no longer Muslims (*murtad*), thus ending their marriages. Frequently these were false apostasies. But false or not, it was a bad situation from the point of view of devout Muslim leaders. In 1938 the newly formed MIT began to choke off this route to divorce by

judges themselves began to search for procedural leeway in dealing with unhappy marriages, official views began to change in favor of a second interpretation. This interpretation gave the *hakamain* arbitral authority. In 1938 the Perhimpoenan Pengoeloe dan Pegawainja (PPDP), only recently established, expressed its support for this second view of *sjiqaq* process, and soon afterward the Nahdatul Ulama indicated that it had no objection. Opposition came from a few modernist leaders, possibly because the second interpretation appeared to deviate from Koranic rules. But although the issue was debated hotly in Islamic circles, by 1940 the *hakamain* appointed in *sjiqaq* cases had acquired authority not only to try to reconcile couples but also to require and effectuate their divorce, if necessary, regardless of the husband's refusal.[54]

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ruling that first instance Islamic courts could do nothing to end the marriages of those women who left Islam, for *pengadilan agama* have jurisdiction only in cases between Muslims. Thus Islamic courts can do no more than accept a declaration of apostasy, but once done, the courts no longer are competent to serve apostates, who must thereafter go to civil court for a divorce; and civil courts, according to judicial rulings of the late 1930s at least, must try such cases by adat law, which may not recognize *riddah* as grounds for divorce. I have no postrevolutionary civil court case material on *riddah,* but it is likely that they would follow this early view. In any event, the MIT rulings on *riddah* evidently did stem the tide of apostasy for the sake of divorce, and *sjiqaq* procedure filled the need for something more acceptable to replace it. See Notosusanto, pp. 83–86; Prins (n. 26 above), pp. 133–134. Even so, in the early 1950s *riddah* cases occurred again in South Sumatra, bringing forth a flurry of letters, pronouncements, and copies of the 1938 MIT decisions from the then Bureau of Religious Justice and the Secretary General of the Ministry of Religion. Their point, again, was that neither religious courts nor local KUA offices could in any way abet those who were trying to escape marriages by means of *riddah.* (Documents of November and December 1953, and September and October 1954.) These problems in South Sumatra and quite possibly elsewhere may have been an additional inducement for establishing religious courts quickly outside of Java, for the courts could offer wives means of judicial divorce that would obviate the need for resorting to *riddah.* Notosusanto reports a case from Ngandjuk (East Java) in 1958 in which the pengadilan agama gave a *fasach* divorce to a woman whose husband admitted leaving Islam for Javanese Buddhism. Although it caused no reaction, Notosusanto points out that the court should properly have refused to hear the case and invited the wife to bring suit in a civil court (*Organisasi,* p. 86). With the numerous conversions from Islam to other religions—Christian, Hindu, Buddhist—following the massacres after the 1965 coup, the problem of *riddah* and divorce may arise in exacerbated ways again.

[54] On development of the *sjiqaq* process, see Notosusanto, pp. 78–82; Prins, pp. 131–133.

Usually the result is divorce, and it is commonly recognized in Islamic courts that this is the essential purpose of the proceeding, though lip service is still paid the notion that its main function is reconciliation (*perdamaian*). In *sjiqaq* procedure the *hakamain* should be appointed from among persons close to the families of the respective spouses, but if none are available for service the court may appoint its own members. (If the latter option is followed, the court must still sit with a full complement of at least three judges—the chairman and two other associate judges.) When they have talked with the troubled husband and wife, perhaps also with the couple's families, and have come to some conclusion about the fate of the marriage, the *hakamain* then act on behalf of the spouses in court. As often happens in these cases, the husband's *hakam* divorces the wife (*mendjatuhkan talak*) in the name of the husband, and the court merely validates the repudiation. The following is a report on a case from West Lombok in which the religious court resorted to *sjiqaq* procedure. Names of the principals have been changed.

> Nuraini, age eighteen, wanted a divorce from Madjid, thirty-five, a police brigadier. Nuraini testified that they were married in 1960. She lived with Madjid for one month, then returned to her parents. During that one month they did not live harmoniously (*rukun*). That was three years earlier. According to Nuraini, they had not married for love, and she wanted nothing more to do with him. He offered her financial support, but she did not want it. She said she would rather die than return to him. Madjid told the court that he pronounced the *ta'lik-talak* when they were married. In no way did he violate promises, nor did he do anything wrong in this dispute. He offered her support while she stayed with her parents, but she refused it. Madjid insisted that he would be patient until she was willing to return to him, and he would not divorce her at all.
>
> The chief judge (according to his own report) advised them at considerable length to settle their dispute peaceably. He pressed Nuraini to return to her husband, but she remained adamant. He then tried to convince Madjid to divorce Nuraini, reminding him that a family not founded on mutual love and loyalty would never enjoy harmony and peace. But Madjid didn't want to divorce his wife. At length, however, Madjid did agree to divorce Nuraini if she would pay him 250,000 *rupiah* [!] to cover his expenditures in their marriage. But

Nuraini was willing to pay a *chulu* of only 15,000 *rupiah*. The judge could not bring the two people together, so he decided to appoint two *hakamain* to settle the conflict between husband and wife as best they could. Madjid's *hakam* was head of a *ketjamatan* KUA in Central Lombok, Nuraini's a *kijai* from her village. After several days of discussion, they failed to come up with a solution. The judge therefore appointed another pair of *hakamain*, a village penghulu for Madjid and a village official for Nuraini. They too failed, one advising Nuraini to return to Madjid, the other advising Madjid to divorce Nuraini.

The court again tried to convince Nuraini and Madjid to reconcile, but Nuraini refused. However, Madjid agreed to divorce Nuraini if she would repay all the costs he had incurred for their wedding celebration: that is, the going price of five large baskets of rice, the rental costs of fifteen buses, the fees for two groups of musicians, the price of a slaughtered cow, and some gold jewelry which he had given her. (This was obviously a big wedding, befitting a high-ranking police official.) Because the disputants remained tensely at odds, the court appointed yet another set of *hakamain*, a penghulu and a *kijai*, both from Nuraini's village (where Madjid may have lived too, though it is not clear from the case report). After some discussion, these *hakamain* decided that the only possible settlement was a divorce, for this would bring positive benefit (*maslahat*). Subsequently Madjid's *hakam* pronounced a *talak chulu'i* on behalf of Madjid with respect to Nuraini, with an *iwadh* of one gold bracelet, which Madjid already had in his possession, and other gold jewelry which Nuraini must return to Madjid. Nuraini's *hakam* accepted the talak by means of *chulu* on these terms. The court approved the solution, citing a maxim from the volume *Quwanin Sjarijah* and Sura IV (39) from the Koran.

In his study of adat and Islamic law, Prins comments that *sjiqaq* process is the one instrument in Islamic divorce law by which a wife proceeds on an equal basis with her husband.[55] However, in an important sense *sjiqaq* actually gives wives one distinct advantage, for (judging at least from cases I have been able to examine) it has come to be regarded in Indonesian Islamic courts as a way of ending marriages when women have exhausted other remedies against recalcitrant husbands. In its

[55] Prins, p. 132.

present form—in which the *hakamain* have authority to compel divorce—*sjiqaq* procedure is a recent development in Indonesia, dating effectively only from the late 1930s. Moreover, it represents an independent development in Indonesia. In Malaysia, according to Ahmad Ibrahim, *kathi* courts in some but not all states have given the *hakamain* in *sjiqaq* proceedings authority to effectuate divorce, though usually under constricting conditions that require prior consent from the parties.[56]

The spectacular increase of *sjiqaq* cases in Indonesia (see table 3) requires some explanation. Except for East Java, where the procedure has evidently been relatively common for a long time and where the rate of use has remained fairly stable, Islamic courts nearly everywhere else in the country have employed *sjiqaq* much more freely since 1963. (The biggest increases, however, were in Atjeh and Kalimantan—from 6 to 108 and from 12 to 137 cases respectively between 1960 and 1965. In West Java and Central Java, use of *sjiqaq* rose more than five times and four times respectively in the same years.) The sharpness of the rise in *sjiqaq* cases after 1963 may indicate an influence external to the courts themselves: for example, it is possible that the Directorate of Religious Justice circularized courts on the subject of *sjiqaq*, though I am not aware that this actually happened. It is also possible that a few of the writings about *sjiqaq* had, by the early 1960s, begun to filter down to Islamic judges. Information campaigns by women's groups may also have been influential, although no obvious evidence indicates that this was so.

Whatever the case, and clearly there is not yet enough data, no explanation of the rising volume of *sjiqaq* cases is adequate that does not include the receptivity of Islamic courts themselves to this procedure. If anything, this receptivity reflects on the orientation of Indonesian Islamic courts toward relieving wives of oppressive or otherwise undesirable marriages. This hardly makes men and women equal in the advantages bestowed by Islamic law, but it does redress the balance more than is commonly recognized. What judicial action in favor of women cannot do, however, what indeed only effective legislative reform can more or less achieve, is to give women the same discretionary power men have with respect to divorce.

[56] Ibrahim, *Islamic Law in Malaya*, pp. 218–222.

Nafkah (Support)

Like much else in Islamic matrimonial law, rules regarding maintenance for wives are decidedly advantageous to men. But the courts do not—cannot if the rules are accepted as limiting, as they are—do much about it. By and large Indonesian women do not rely very much upon the likelihood of post-divorce support, though there may be a growing interest in suing former husbands for support money owed during marriage and the *'iddah* period. Divorced women tend rather, if they must, to return to their parents. Moreover, women throughout Indonesia are active in small trade and often dominate local markets, so that self-support is not at all unusual.

While married, women are clearly entitled to certain kinds of maintenance from their husbands. Among these are adequate food (*nafkah*, *nafaqah*) and clothing (*kiswah*). Although the term *nafkah* is used by Indonesians to refer to maintenance generally, Islamic courts tend to restrict its meaning but also to rely upon the broader statutory mandate of the laws of 1888/1937 to hear litigation involving all support responsibilities of husbands toward wives under Islamic law. These include not only adequate food and clothing, but also a residence, some furniture, and personal effects, all within limits set by the husband's wealth but never amounting to nothing.[57] A husband's inability to provide for his family is grounds for *fasach* divorce. Suits are sometimes brought by women who do not intend (yet) to seek divorce but who do wish to compel their husbands to fulfill their legal responsibilities. Islamic courts do not hesitate to order delinquent husbands to pay their wives or otherwise give them their legal due. (But if a husband refuses to heed such a ruling, his wife must go to civil court, the *pengadilan negeri*, to secure enforcement.) Cases have frequently arisen over the issue of residence, a difficult problem in a country of widespread poverty. At various times religious courts have held that a wife is entitled to a residence—owned, rented, or borrowed—appropriate to her social station.[58] But there is less consistency on this point, and it is less often dealt with by Islamic courts, than other issues involving

[57] Notosusanto, pp. 94–98; Thaha, *Pedoman Perkawinan*, pp. 93–100; Soewondo-Soerasno, *Kedudukan Wanita*, pp. 51–52.

[58] Notosusanto, pp. 97–98.

conjugal residence. For example, the courts have ruled that a wife cannot be forced to live with a mother-in-law whom she does not like, nor with a former wife of her husband, nor with the concurrent wife (or wives) of her husband.[59]

Along with adequate food, clothing, residence, and related support, wives are also entitled to a dower (*mahr*); if it is not paid by the time of a divorce, the courts usually rule that husbands must give it to their former wives as a matter of right. Generally this is a small sum, often no more than a few *rupiah*, but in some areas of the country huge dowers are still customary. Upon divorcing his wife, moreover, a husband must give her a certain amount of money, clothes, or other goods as a divorce gift (*mut'ah* not to be confused with a *mut'ah* marriage). According to Notosusanto, this *mut'ah*, whose purpose is "to make the wife happy," is presented after the *'iddah* period is over. In 1938 the MIT ruled that *mut'ah* gifts fall under the jurisdiction of Islamic courts because they may at times be considered a substitute for the *mahr* payment.[60]

Following divorce a wife is entitled to limited maintenance during her *'iddah* period of three menstrual flows, including the full length of time she may be pregnant. The circumstances of a divorce are important here. Although I have no substantial case material on maintenance issues, the rule followed by Islamic courts appears to be (as Sjafi'i doctrine holds) that a wife divorced by a third *talak*, or three *talak* at once, must be given a residence during her *'iddah* but not necessarily food and clothing, unless she is pregnant. In other kinds of divorce, where the presumption of fault is against the husband, full support is owed during *'iddah*. But pregnancy always requires full support of mother and child during *'iddah*.

> ZS, twenty-five, a primary school teacher, brought suit against MSB, twenty-nine, a railway employee, for maintenance during her *'iddah* period. She claimed support from the time he divorced her on December 31, 1960, through the completion of her third menstruation—a total of thirteen months, including nine months pregnancy. MSB admitted in court that he had divorced her by *talak* and that he had not given her *nafkah*

[59] Ibid.
[60] Ibid., p. 101.

during her *'iddah*. The court ruled that ZS's testimony was reinforced by her own oath and her claim must be accepted. The court held that MSB must pay full support for the *'iddah* period of thirteen months, amounting to 9,975 *rupiah*. [Palembang, July 2, 1962]

No support is required from a man for his former wife after her *'iddah*.

Rules regarding child support following divorce are disadvantageous for mothers and children. But legal disadvantage is often tempered by a deep sense of familial responsibility on the part of grandparents, particularly maternal grandparents.[61] Fathers may of course, and often do, contribute to the upkeep of their children following divorce, but they are not consistently required to do so legally, making evasion of responsibility common.[62] Islamic courts appear to be sympathetic to divorced mothers with children, but their competence is limited. Indeed, Islamic courts in Java have no competence at all in child support (*hadanah, hadlanah*) cases. They do in the outer islands, however, under Government Regulation 1957/45. Notosusanto reports a case from North Sumatra in which the *pengadilan agama* ruled that a man who had divorced his wife with three *talak* must pay monthly support for two children, one age three years and the other age ten months.[63] It was not indicated, though, how long this support must continue.

Given the poor economic condition of so many Indonesians, particularly among the lower strata who dominate the clientele of Islamic courts, it might seem odd that relatively few maintenance issues are brought before the courts (see table 3). In order to understand this, the perspective one adopts on substantive law has to be broadened immeasurably, because Islamic

[61] See, for example, Hildred Geertz, *The Javanese Family*, p. 144.

[62] In Atjeh, according to James Siegel, "In case of divorce, men are supposed to provide for their children. In the cases I know of and according to the judges of the Islamic courts, they do not do so. The only recourse for women is to leave the children with their fathers, but as the women usually can provide for them without the fathers' help, they do not do this. No children that I know of went with their fathers at the time of divorce, even in those cases where the mother was mentally retarded." *The Rope of God* (Berkeley and Los Angeles: University of California Press, 1969), pp. 140–141.

[63] Notosusanto, p. 103.

rules and institutions have much less influence in these social regions than local custom and customary sanction. It has already been mentioned that the maternal family tends to assume responsibility for divorced wives and their children, and women are economically active enough nearly everywhere in the country to enjoy a measure of independence, even during marriage. These factors may indeed help to account for the high rate of divorce; there are few terribly burdensome economic or kinship costs involved in divorce.[64] To bring suit for child support may tend to reflect not only on the poverty of a mother's family but on its irresponsibility, as well as on the mother's own incompetence. But the rise in support cases—probably actually higher than table 3 indicates, for *hadlanah* cases from the outer islands are likely subsumed in the "other" category—may indicate a declining reluctance in this respect. Particularly in large urban areas, weaker kinship ties and heavier inflationary pressures (mainly in the early and mid-1960s) may have compelled women to try to get what they could. If so, assuming this "trend" continues, the Islamic judiciary will likely come under growing pressure to serve the needs of divorced women for improved maintenance. The point of this analysis is that as economic need increases and kinship bonds fail to provide as they have in the past, people will begin to seek out other means of assistance. Islamic family-law institutions are an obvious target for such demands. So are civil government agencies, including civil courts, which may eventually pre-empt the essentially minor welfare functions of Islamic administration, if they are financially able to do so. But in the meantime Islamic courts must deal with divorce-related problems, over which they have had limited legal jurisdiction but even more limited "real" social jurisdiction and therefore not very much pressure from their clientele. When and if they are called upon to expand their services, the substantive Islamic law of family support will not help much. Nor will prevailing Islamic attitudes with respect to legal change.

CHANGING DEMANDS AND THE RESPONSE OF THE ISLAMIC JUDICIARY

These last comments raise two larger issues: What kinds of new demands are generally being brought to bear on Islamic

[64] Cf. H. Geertz, *The Javanese Family*, p. 144.

courts? and How far can the courts go in dealing with them? Any answers to such questions must vary from society to society. For they depend not only upon the adaptability of courts, relative to the sorts of pressures brought to bear on them, but also upon the flexibility or rigidity of the political and ideological bases of the courts in society.

As Islamic courts have spread throughout Indonesia, and as women have become more aware of the possibility of claiming rights in the courts—partly by word of mouth and partly too, in some circles, as the result of work done by women's organizations—pressure has begun to build up for the courts to expand their competence and, with it, the rights of women with respect to marriage. There is nothing very systematic in this pressure, and the patterns of it are not extremely clear. Indeed, our discussion here is conjectural, oriented to a few hypotheses about substantive legal change in Islamic courts. One of these hypotheses, requiring more data to substantiate, is that as women have gradually discovered Islamic courts to be even somewhat sympathetic, they have begun to bring more of their troubles to them.

Aside from immediate family, there is hardly any place else to take such problems. Relevant civil welfare agencies either do not exist or are ineffective. Civil courts, when they are competent, must rule according to accepted conceptions of adat law in issues of ethnic Indonesian family relationships, and local adat law may be quite as unfavorable as Islamic law to women in support cases and the like. In some areas of the country, indeed, it may be more disadvantageous. Potentially, of course, civil courts may read into local adat law new conditions that improve the marital property rights of women, as they have done in the case of inheritance.[65] But this has not yet occurred on a scale significant enough to attract women claimants in marriage-related suits. Moreover, undertaking suits in the civil courts requires knowledge or expert advice, some courage to face the discomfiting formality and social embarrassment, and considerable patience, for civil cases take notoriously long. Consequently, women continue to go to Islamic courts with wide-ranging family-related claims, though these courts may not have jurisdiction; and even when they do, their lack of enforcement authority makes every-

[65] See Daniel S. Lev, "The Supreme Court and Adat Inheritance Law in Indonesia," *Amer. J. Comp. Law* 11 (1962/2).

thing very difficult for women with recalcitrant mates or former mates. As Islamic courts do concern themselves entirely with family law, and primarily with marriage law, there is some reason for women to suppose that the courts will entertain related issues. They are frequently wrong, of course.

In Java, for example, Islamic courts have no jurisdiction over division of property following divorce, nor over child support. Yet it is not at all rare for women to come to the *pengadilan agama* with claims related precisely to these problems, when they are aware, moreover, that the law of the matter probably goes against them. The following incident is typical:

> At the Islamic court of Semarang, Sueb (an assistant) spoke with some women who were waiting outside to register cases. One woman told him she had come to court concerning the division of property between her husband and herself after they were divorced. She wants a fifty-fifty division. The law, she said, provides two-thirds/one-third in favor of the husband. But this is unfair, she argued, because the woman has to take care of any children usually. She wants her former husband to be responsible for providing for their child, because she gets only one-third of the community property (*gono-gini*). Otherwise, she wants half of the community property. But the court, she thinks, will not give it to her, because it is not according to law. [Semarang, June 28, 1960] [66]

[66] The principle of two parts for a man and one part for a woman, as stated by this woman, is common in Java and many other areas of the country with respect to division of marital property. It frequently works out otherwise in practice, however, and a fifty-fifty distribution is not at all rare; in fact, many believe, and ter Haar argued years ago, that an equal-distribution rule is most common, at least in Java. In any event, these are adat rules, and the two-to-one principle should not be confused with the Islamic rule of two-to-one in favor of men, which applies to inheritance. Distribution of property following divorce concerns only community property (*gono-gini, guna-kaja, barang pentjaharian*) accumulated in common by the spouses while they were married. The two-to-one rule (or the fifty-fifty rule, where it is common) derives from suppositions about how much each partner is likely to have contributed to marital property. Property brought into the marriage by each partner (*barang asal, harta pembawaan, harta pusaka*) remains individually owned and is not subject to division. Islamic courts have no competence in these issues. See further, B. ter Haar, *Adat Law in Indonesia* (New York: Institute of Pacific Relations, 1948), esp. pp. 192ff, on distribution of marital property and rule variations throughout Indonesia. Also, Juynboll, *Handleiding*, pp. 202–203; and Prins, pp. 107–110. Rules applicable to the distribution of property are somewhat more favorable for women in

This case was not followed up, but the judge or a clerk probably advised the woman that the Islamic court had no jurisdiction, that Sjariah rules favored her husband anyway, and that she would simply have to make do. An extraordinary judge might have offered to help by trying to talk with her former husband, but if so the odds were against success.

Where lack of jurisdiction is clear, Islamic courts tend not to try suits, though individual judges occasionally lend other kinds of personal assistance. With a bit of vagueness in the jurisdictional issue, however, Islamic judges frequently will not hesitate to consider a case. Formalistically inclined judges might of course refuse to hear suits on grounds that their competence is uncertain. But very often judges do not refuse unless an appeals court, or the Directorate of Religious Justice, or some other governmental instance explicitly challenges them. Islamic judges themselves tend to assume responsibility, in a social as well as a legal sense, for resolving conflicts brought before them. Notosusanto mentions a paternity suit brought by a woman who wanted the court (in Ngandjuk, East Java) to compel the father to marry her. The religious court did not reject her suit, but it did reject her claim, on grounds that the father already had another wife who would object to a second marriage—and who threatened divorce—and who, in any case, was too closely related (an aunt) to the unwed mother. The court's reasoning was that the first marriage should not be destroyed merely in order to correct a wrong.[67] But nothing was done about the illegitimate child. A quite different sort of issue, a novel one, arose in a West Javanese *pengadilan agama* in the early 1960s. Here the court was confronted by a woman whose husband had left her. Not only did she want a divorce (*fasach*) and *nafkah*, but in addition she insisted on damages from her husband for the heartache he had caused her. Never having experienced such a problem, the

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Malaysia as a result of legislative enactments that make it possible to deviate from both adat and Islamic law. See Ibrahim, *Islamic Law in Malaya*, pp. 228ff. It is worth noting, in connection with the statements of the woman above, that she did not distinguish between adat rules and Islamic institutions. For her, as for many and perhaps most, in everyday life adat and Islam are somehow amalgamated, and the Islamic court is basically an adat institution. A tense distinction is made when ideological conflict calls attention to alternative sources of political authority.

[67] Notosusanto, pp. 53–54. The case arose in 1960.

judge in charge was confused, but at length he decided against the claim for damages, presumably because there were no grounds in Islamic marriage rules.[68] It is worth noting, however, that he did not refuse to hear the claim.

Other examples are available, but the above suffice for the points to be made here. First of all, women are making new kinds of demands upon Islamic courts, and probably with greater frequency than ever before. Second, the courts are not unresponsive; on the contrary, they tend generally to be reasonably sympathetic. Third, however, it is essential for Islamic judges interested in helping women with claims that the issues raised in court be somehow manageable within boundaries more or less determined by Islamic legal rules and assumptions. Fourth, and finally, at rock bottom the substantive family law of Islam is distinctly limited in what judges can do with it to find ways of accepting and dealing with new problems brought before the courts. It is even more limited in Indonesia than most Islamic countries, because of the exclusive domination of Indonesian Islamic legal practice by Sjafi'i doctrine.

The primary problems of change, then, are rooted only partially in the courts themselves. Islamic courts are poorly staffed by inadequately trained judges, who do not have sufficient status to assume innovative legal leadership. But they are basically capable of fulfilling essential social functions and of reacting sympathetically to new kinds of demands made upon them. Within the Indonesian Islamic judiciary, a great deal of both procedural and substantive legal change can be absorbed quite well, as the last three decades of development have shown, as long as no excessive demands for formal precision and correctness are made on religious judges. This is not to deny the inherent conservatism of religious institutions, a conservatism that is understandably even more bedrock than that of civil institutions, but it is to argue that such conservatism is often institutionally variable, and its sources may be located unevenly through the institutional structure. Judicial institutions in Islam are hardly independent or autonomous; nor are they anywhere in practice, but in Islam they have not been so in theory either. Like other kinds of institutions, however, they undoubtedly have responded

[68] Interview with H. Z. A. Noeh, Directorate of Religious Justice, Nov. 4, 1964.

in some degree to pressures from those who use them in one way or another. In Indonesia, moreover, the religious judicial system, having been rather fully centralized since the revolution, is set up to facilitate rapid and standardizing signals from Djakarta.[69] And at the top of the judicial hierarchy, the Directorate of Religious Justice, reform and adaptation are by no means dirty words. Apart from bureaucratic interest in survival, Islamic judicial leaders and personnel are as much functionally as sacredly oriented—a distinction that would be unacceptable to the men who staff the institution, however—and this too does not work against change.

The thicker and harder roots of problems of legal change are buried deep in political and ideological earth. This says no more than what should be obvious already: what is at issue with respect to legal change is much less the responsiveness of courts than the responsiveness of political and doctrinal authority.

Rapid change in the posture of Islamic courts toward given social-legal problems must necessarily depend upon decisions by authorities very high up in the judicial, administrative, and political hierarchies. The remarkable development of *sjiqaq* procedure in Indonesian Islamic courts depended not only upon encouragement from the Mahkamah Islam Tinggi, in the late 1930s and afterward, but also upon support from Islamic political and bureaucratic organizations. Considerable debate nevertheless took place before the notion was accepted that the *hakamain* should have full arbitral authority. Yet men could argue that the deviation from traditional Sjafi'ite practice was really minor —though some disagreed—and it enabled Islamic administration to deal with serious problems confronting the Muslim community. (As Notosusanto and others have argued with respect to different issues, this one could have been dealt with more easily were all four schools of legal doctrine fully accepted by Indonesian Islamic legal thinkers and administrators.) Once Islam-

[69] By contrast Islamic legal reform in Malaysia tends to be quicker because of a tradition of legislative intrusion into Islamic family law that dates from the English colony, but the autonomy of Malayan states in religious affairs makes such reform uneven and disparate. See Ahmad Ibrahim, *Islamic Law in Malaya*, passim. In Indonesia reform is slower because political conflict obstructs legislative action, but once a reform or alteration is agreed upon, fairly uniform policy can be carried out quickly.

ically legitimate authority agreed upon the new interpretation of *sjiqaq*, first instance religious courts had no difficulty putting it to use.

In order to meet the expanding demands of women for better protection of their interests, however, Islamic groups must go farther and farther afield from traditional legal doctrine. One can imagine a rising scale of ever more shocking demands from the point of view of Islamic legal purists, whether traditionalist or modernist-scripturalist. The judiciary itself can deal with change effectively only with the authoritative guidance of the Ministry of Religion and Islamic parties. But even when Islamic political and bureaucratic leaders are agreed that certain kinds of legal change are permissible—and many are not—to promote such change openly calls up hard ideological problems that are very difficult for Muslim leaders to manage, because of the structure of Indonesian political conflict. The ideological symbolism of Islamic law is too central to the Islamic struggle to be toyed with. This problem will be taken up again in the concluding chapter.

CHAPTER SIX

Islamic Courts and the Inheritance Problem

In all Indonesia, perhaps no legal issue is more confused, more likely to excite intricate and lively debate among legal professionals and political activists both, than inheritance. A huge amount of material has been published on the subject since the turn of the century. Still no comprehensive resolution of the issue is in sight, and no attempt has been made to legislate an inheritance regime for the entire country. Only in the agrarian law of 1960 can one find provisions that affect inheritance, mainly in the form of survey and registration requirements. In this chapter, again, our primary concern is not the details of substantive law; they will be paid minimal attention. For our purposes, the general issue of inheritance law in Indonesia illustrates particularly well the weaknesses and strengths of the Islamic judiciary. In addition, the inheritance problem shows with great clarity how law, authority, ideology, social conflict, and institutional conflict are inextricably woven together.

There is no space here to describe all the customary inheritance regimes of Indonesian societies. Ter Haar's *Adat Law in Indonesia* is a good introduction. It is enough for our discussion to say that all the major types of kinship organization exist in Indonesia—bilateral, patrilineal, matrilineal—and patterns of in-

heritance law generally follow accordingly. Within the overall patterns there are many local variations. As economic and social conditions change, adat inheritance practice also changes with more or less strain. In recent years national civil courts have begun to interpret local customary inheritance law more freely, imposing more uniform attributes characteristic in part of Javanese conceptions of family law and in part of cosmopolitan intellectual standards.[1]

Islamic inheritance law can be treated, albeit superficially, in a few more sentences. It has the advantage of being uniform, simple, and direct. Two essential groups possess rights of inheritance. One is the agnatic kin (*asabat*) of the deceased, formerly sole heirs under the patrilineal rules of pre-Islamic Arab family structure. They remain residual heirs to the bulk (theoretically) of an estate, receiving their share after the second category of heirs receive specified portions. The second group (*ashabu'l-fara'id*) are those who the Prophet believed should also justly share in inheritance. A profound social innovation, this second category established inheritance rights for women kin.[2] As biological connection is crucial to the first category of heirs, adoption has no legal consequences.[3] Among other propositions of Islamic inheritance law, this one does not generally hold in Indonesia, where adoption is frequent and may have the full legal consequences of bestowing inheritance rights on an adopted child. Similarly, as the Islamic rule provides that nearer kindred exclude more remote kindred from inheriting, there can be no representation in succession or substitution of heirs; an orphaned son does not inherit the portion of his predeceased father. This rule has been an issue in many Islamic countries. In Egypt, Syria, Morocco, Tunisia, and Pakistan modern legislation has in one way or another bypassed it.[4] In Indonesia those who oppose

[1] See Daniel S. Lev, "The Supreme Court and Adat Inheritance Law in Indonesia," *American Journal of Comparative Law* 11 (1962/2), and Lev, "The Lady and the Banyan Tree: Civil Law Change in Indonesia," *Am. J. Comp. Law* 14 (1965/2).

[2] On the place of women in Islamic inheritance law, see A. A. Fyzee, "The Fatamid Law of Inheritance," *University of Malaya Law Review* 1 (1959/1).

[3] On the origins of Islamic inheritance rules with respect to adopted children, see Reuben Levy, *The Social Structure of Islam* (Cambridge: University Press, 1962), pp. 147–149.

[4] See N. J. Coulson, "Islamic Family Law: Progress in Pakistan," in J. N. D. Anderson, ed., *Changing Law in Developing Countries* (Lon-

Islamic law often use the rule as a symbolic bolt to fling at Islamic claims that the Sjariah is perfectly suitable for the Indonesian sense of justice. Formulae of distribution in Islamic inheritance law are clear and precise: an eighth for a wife, a sixth for a father, grandfather, mother, grandmother, sister, niece; a daughter receives a half if there are no sons, one-third if there is a son, and so on. All heritable property is assessed in monetary values, so that the shares can be worked out exactly. Since rules of succession are in the Koran itself, they are considered especially compelling. But the Koranic rules do not incorporate all of Islamic inheritance law. Rules relating to wills and gifts from heritable estates developed gradually as means of modifying the Koranic law of intestate succession; they are legitimate and frequently used.[5]

THE INHERITANCE PROBLEM

What we are calling the inheritance problem does not, as one would expect in the first place, have to do with the economics of the matter. Inheritance obviously does have have critically important economic import.[6] But Indonesian leaders have

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don: Allen and Unwin, 1963), p. 253; also J. N. D. Anderson, *Islamic Law in the Modern World* (New York: New York University Press, 1959), pp. 76–77.

[5] On wills, see Fyzee, "The Fatamid Law of Inheritance," pp. 245–246. Fyzee points out that actually wills were not always considered proper acts, despite the tradition that a Muslim with property should not sleep two nights without making a will. The reason is that while men may dispose of property as they wish during life, yet to do so after death goes against the plan of God for distributing inheritances. Yet wills are often made and, in Indonesia, apparently increasingly so. I have no evidence for Indonesia that a sense of their impropriety remains.

[6] In Indonesia, as elsewhere, Islamic inheritance rules, where they have been put to use, tend to encourage a fragmentation of landholdings. A case from an Islamic court in Lombok demonstrates the effect. A man died leaving three daughters, the plaintiffs, and a son, the defendant. Their inheritance consisted of one parcel of wet rice land, 0.440 hectares, and another parcel of dry land, 0.17 hectares. The son held both parcels, farming them and giving part of the harvests to his sisters. The daughters came to court to sue for a division of the inheritance. Their brother admitted in court that all that his sisters said was true. But he objected to dividing the land up because it amounted to so little. The court, however, decided in favor of the plaintiffs, giving 0.055 hectares to the wife of the deceased, 0.077 hectares to each daughter, and 0.154 hectares to the son. (Lombok, June 19, 1963.) Adat law devotees often say that custom, for example in Java, views immovable property as an indivisible whole. See B. ter Haar, *Adat Law in Indonesia* (New York: Institute of

ignored the economic issues of inheritance. No dominating economic plan or vision for the entire country has ever emerged that would make it necessary to fit inheritance into it.[7] The essential bases of the "inheritance problem," for our purposes, are social, political, and ideological. They have to do with the extent and character of Islamic expansion in Indonesia and the definitions of the Islamic struggle to which Muslim leaders have been wedded. More concretely, while Islamic growth in Indonesia has failed overall to change common patterns of social organizational norms—law—Islamic leaders have been unwilling or unable conceptually to give up obedience to religious law as an essential affirmation of the Islamic faith and struggle.

When the issue of inheritance is raised nearly anywhere in Indonesia (other than in Christian and Balinese-Hindu areas) it is usually interpreted in the context of the simple question: is it adat or Islamic law? Non-Islamically oriented leaders answer confidently that only adat law reflects the true sense of justice of the people and that only here and there has Islamic law been received as adat law. Devout Muslims reply as quickly that Indonesians are predominantly Islamic and therefore accept Islamic law, which is more just than and in all other ways superior to

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Pacific Relations, 1948), pp. 199–200. Along with other rules of landholding in Java (and elsewhere), some of which vest only rights of usufruct rather than ownership, this would of course prevent fragmentation. But in recent decades population pressure on scarce land, especially in Java, has made such rules increasingly otiose. Land nearly everywhere in the country has become the object of proprietary ambitions, no matter how small the plot. The agrarian reform of 1960, were it actually and fully implemented, would tend to militate against fragmentation. After the attempted coup of 1965, however, the agrarian reform began to fall by the wayside as the result of lack of bureaucratic interest and opposition to it by the remaining non-Communist political parties.

[7] Social visions have had more influence than economic ones. The Eight Year Plan of 1960 foresaw a more or less uniform inheritance regime for all Indonesia, in which bilateralism would be the dominating pattern. Implicitly, the goal of such proposals, which have come to nothing in formal law, was to weaken and eventually to eliminate unilineal clan-organized family systems outside of Java. This appears to be a fairly common objective in family-law reforms in new states. One reason for it probably is the desire of political elites to get rid of intermediary social structures, such as clan organizations, which tend to block the direct and consistent contact of governments with individual citizens. On the Eight Year Plan proposals, see *Rantjangan Dasar Undang-undang Pembangunan Nasional Semesta-Berentjana delapan tahun: 1961–1969,* vol. IV, p. 2624. The National Institute of Legal Development (L.P.H.N.) has tended in the same direction of family law concepts.

primitive adat law. A myriad issues of *is* and *ought* are raised by both sides, most of them repeated thousands of times since the 1920s and 1930s. Adat law supporters point out that Islamic inheritance law definitely is rejected by the matrilineal Minangkabau of West Sumatra; that the Islamic rule against representation in succession goes against the grain of Indonesian values; that the Islamic denial of inheritance rights to adopted children does not apply in Indonesia, and so forth. Muslim spokesmen respond that Islamic law has the merit of uniformity and precision over the diverse adat law. Beyond this argument, however, they are defensive about Islamic law, sharing doubts perhaps, but bound by ideological terms for which no adequate alternatives have yet emerged. They mention that Koranic rules of exclusion can be overcome merely by means of a testament (*wasiat*) or a gift (*hibbah*).[8] Finally, devout Muslims are apt to say that, in any event, Islamic rules of inheritance are God's law and must be obeyed by the Ummat Islam. Not much progress has been made in the debate since colonial times.

To render the problem clearer, it has to be dealt with on at least three levels of analysis. First, how do people actually handle their inheritance affairs, and how much influence has Islamic law had on customary practice? Second, how do civil and religious courts deal with inheritance, and under the impetus of what kinds of doctrine and judicial attitudes? Third, what is the ideological significance of the inheritance issue in local and national political-religious conflict? The implications of these questions are hard to disentangle. They will be discussed partially in this segment and partially in the rest of the chapter. Here the first and third questions will be paid primary attention. Later, judicial problems and Islamic attitudes on the inheritance issue will be taken up.

Much is said about whether people follow adat rules or Islamic rules of inheritance. Generally speaking, there is little evi-

[8] See, for example, the discussion of Prof. Hazairin's paper before the National Law Seminar of 1963 by H. Toha Jahja Omar in *Perdebatan dalam Seminar Hukum Nasional tentang Faraid* [The debate in the National Law Seminar concerning Islamic inheritance rules] (Djakarta: Tintamas, 1964), pp. 6ff, and the discussion by Prof. H. Mahmud Junus in the same volume, at p. 80. Thus, according to Junus, "Representation in succession does not exist in the Qur'an. But if we want to accomplish this, there is a path, that is by means of a will. This has already been approved by the inheritance statute of Egypt."

dence to suggest that Islamic inheritance law is followed faithfully by devout Muslims, any more than less committed Muslims or non-Muslims follow adat rules completely. The conception that people do so results partly from colonial adat law studies. Excellent as the scholarship was in these surveys, in the nature of them they tended to concentrate on substantive rules. Moreover, as was pointed out earlier, often they were not a little concerned to demonstrate that Indonesian tradition prevailed over Islam. Consequently, adat law researches usually made explicit a number of very clear-cut customary rules of inheritance —for example, a half to a wife in one area, a third elsewhere, so much to children, daughters excluded here, included there, adopted children excluded in one place but not in another, this type of property excepted, that type included, and so forth. Implicitly, at least, these findings were then matched against Islamic law. In most cases they were different, in some the same, depending on the area of investigation and, perhaps, the biases of the researcher. The published results were and are profoundly influential in civil courts. A case described by a Djakarta advocate indicates the occasional results of such views of adat law.

> Prewar research sometimes divided up villages according to the numbers of people who followed one rule rather than another. I have an inheritance case in Kudus [north Central Java]. My client is a male involved in the case. Prewar research by someone concluded that east of a river in Kudus the Islamic law holds, but west of the river adat law prevails. What meaning does this sort of conclusion have? It is silly to say that west of the river one law is followed, and east of the river another law. But in the case at hand I have to devote myself to the interests of my client. Since the case arose east of the river and my client is a man, I used this research in my brief to claim that the Islamic law has already been received by the adat law of the area where the dispute originated, and that therefore my client should be given a greater share of the estate. The *pengadilan negeri* [first instance civil court] decided in my client's favor, but the decision has been appealed. [Feb. 3, 1960]

Very little adat research is being done now, and the influence of prewar studies is declining somewhat. Yet even now, in conflicts before them, civil judges tend to apply rules described in old adat law studies, giving them a precision that makes little

sense to the way most people actually handle such issues outside of court. This is not meant to imply that judges have any real choice in the matter, for they must apply some rules precisely; that is their function. The point here is simply that it is a mistake to suppose that a judicial solution can replicate village law.

Outside of court people usually divide inheritances in something less than a rule-oriented way. The general pattern of local kinship systems is of course influential in determining principles of succession. But who gets what, and in what proportion, is usually worked out according to individual need, sympathy, regard for personal condition and relationships, and some bargaining. In Java people try to distribute inheritances in a way that takes care of everyone in the family, as much as possible, taking into consideration the wherewithal, needs, obligations, and past contributions of each. Among the Toba Batak, whose patrilineal adat rules exclude females from inheritance, daughters are frequently provided with a piece of land or other substantial support as a "gift." [9] And in other groups similar qualifications of the apparent rules occur with enough regularity to make the boundaries of these rules seem very fuzzy and flexible in practice. (It is probably true in nearly all societies that informal management of succession is characterized by such flexibility.) Popular law, so to speak, is often more oriented to procedure than to substance. Particularly in Java, but elsewhere too, substantive rules are easily and quickly sacrificed under the influence of an elaborate concern with avoiding tension, conflict, and bitterness. Rights tend not to be pressed, and seldom even raised; rights are for courts, and their mention is frequently regarded as an expression of hostility and antagonism, producing conflict rather than harmony.[10] Consequently, rules to the contrary notwithstanding, actual inheritance problems tend to be resolved in crazy-quilt fashion. Even after a judicial ruling by a civil or religious court,

[9] See J. C. Vergouwen, *The Social Organisation and Customary Law of the Toba-Batak of Northern Sumatra* (The Hague: Martinus-Nijhoff, 1964), pp. 60–61. In Atjeh, where the influence of Islamic inheritance law is evidently very strong, the thrust of Islamic rules is qualified by the practice of presenting daughters with houses when they marry. In wealthy families land is also sometimes given to daughters, evidently. James Siegel, *The Rope of God* (Berkeley and Los Angeles: University of California Press, 1969), pp. 138–139.

[10] See the discussion of concepts of justice in Daniel S. Lev, "Judicial Institutions and Legal Culture," in Claire Holt, ed., *Culture and Politics in Indonesia* (Ithaca: Cornell University Press, 1972).

these social principles of procedure may still prevail, resulting in a final settlement quite different from that ordered by the court.[11] But a formal judicial trial naturally makes it easier to press substantive rights and interests.

If rules are seldom followed with anything like precision, nevertheless there are general patterns of adherence. These patterns permit the question: How much influence does Islamic law have on local customary rules of inheritance? No definitive answer is possible—which seldom stops men from giving one—partly because the mix of rules tends to change over time. Generally, however, it is safe to say that a major variable affecting the influence of Islamic law is the compatibility of basic assumptions of Islamic family law with those of local kinship organization, as it once was and as it is becoming. If other social and political conditions are conducive, Islamized groups with patrilineal attributes are likely to have received elements of Islamic inheritance law, unless the bias against recognizing any kind of inheritance rights for women is very strong. Where family structure is bilateral, as in Java or Atjeh, the influence of Islamic inheritance law may be even greater, because the recognition in Islamic law of the *ashabu'l-fara'id* provides leeway for the logic of bilateralism. In matrilineal areas—the Minangkabau—there is hardly any place for Islamic inheritance rules, except among those who have moved away from traditional family ties.

Changing patterns of family organization may positively affect the influence of Islamic inheritance law. While religious devotion alone might not be enough to encourage obedience to religious law, utility often is. As Prins has argued, particularly with respect to outer-island societies, the growth of Islam may

[11] In his study of the adat law of Christian Toba Bataks, Vergouwen indicated what a slippery task it is to identify precise rules. "The investigator who tries to learn and to observe how the law operates and according to what rules the judges are guided in their decisions, often comes across deviations which are actually practiced. One sometimes cannot escape the impression that, according to popular feeling on the matter, there is little need for a precise legal system. And it is almost impossible to get a clear and understandable reply to many a concrete question. One thinks one has been given the correct answer only to find that, in fact, it can also be otherwise. One tries to find the common element in all these variations and encounters either a particularly cordial relationship, or a special custom in a small group, or a very old basis of living together, or a recent arrangement. . . . [O]ne can only indicate an outer framework, a sphere within which life is enacted in different manners" (*Social Organisation and Customary Law of the Toba-Batak*, pp. 143–144).

partially reflect its attraction to people who are in the process of departing traditional social bonds and values.[12] When patterns of family organization have begun to change, Islamic inheritance rules may serve the function of supporting the new pattern. Thus urbanization tends to weaken clan and extended-family influence in favor of nuclear households, for which Islamic inheritance law is more suitable and advantageous than prevailing custom. Ter Haar and others called attention to this kind of evolution among the Minangkabau in the 1930s, referring to it as "individuation." The term may not be adequately descriptive, though it is tempting to analyze the process, in Maine's terms, as one in which people are moving from predominantly ascribed statuses toward freer "contract" orientations. Indeed, the process appears to be most noticeable among people who are commercially occupied. In any event, what is basically involved is a narrowing down of the economic and social relevancies of the family in the major cities of the archipelago, among not only the Minangkabau but other groups as well. The result increasingly is that parents want to devolve property, not back to family guardians, but directly to their children, who presumably have to make it on their own. The pertinence of Islamic law is, again,

[12] J. Prins, *Adat en Islamietische Plichtenleer in Indonesie* (The Hague and Bandung: von Hoeve, 1954), passim. Prins's analysis probably bears more weight in areas outside of Java than in Java itself, for reasons related to the rate and quality of social change. Where Islam has something of a comparative advantage in personal-law benefits, its attraction is likely to be relatively great. In some areas of Sumatra, for example, in personal law as in commercial values, Islam has provided some measure of individual freedom from the constraints of older custom and customary authority. At the present time in Java, it may be that economic pressure has led people to favor the Islamic legal notion that adoptive children cannot inherit, an apparently changing value which civil judges have noticed in various parts of Java. But for the most part Islamic law does not have a comparative advantage in Java. In the case of women, Javanese custom has generally assured them a fairly strong place in society. It is partly for this reason, as well as others related to higher education and the like, that Javanese women have led the movement for legal reforms influenced essentially by (and often surpassing) European legal concepts of equality. Moreover, the national Supreme Court, dominated by Javanese judges and those who have lived long in Java, has begun to read a considerable degree of equality between the sexes into new family-law jurisprudence. Even as Islam stands as a liberating force in some parts of the country, then, it is being left behind in others. It may be that in a short time civil courts and law will be seen to offer advantages of legal change everywhere, reducing the appeal of Islamic legal rules and institutions even outside of Java.

that it is usefully available to people in need of it, along with the support of a community which religious law itself helps to define. Civil law may of course provide the same kind of support. This is already occurring through the agency of civil courts, and the process may speed up with the atrophying of conservative conceptions of judicial recognition of local adat law.

It is the relationship of law and community, especially Islamic law and Islamic community—*hukum* and *ummat*—bound up as they are in a knot of religious conceptualization, that lends political weight to the kind of change mentioned above. The contest for authority between Islamic and non-Islamically oriented principles and elites persistently threatens to transform a continuum of social change into a political polarization.

Law is not the overriding issue in such contests. It is symbolic of social-political cleavage, a flag raised in battle. The bigger the cleavage and the harder the battle, the higher and more vigorously the flag is waved. Most spectacularly has this been the case among the Minangkabau, who have accepted Islam in all critical respects but the law of inheritance. To receive Islamic inheritance law would turn Minangkabau social organization and authority upside down. This was (and is) exactly what devout Muslim leaders, those who had moved away from traditional village authority—often physically, to Padang and other West Sumatran cities—wanted to do. Even so, for long periods of time Minangkabau adat and Islam have lived in relative peace, which means that Islamic leaders called off the challenge momentarily, satisfied for the nonce with other gains for Islam.[13]

This has been so nearly everywhere else in the archipelago, making allowances for different historical and social and cultural circumstances. Left alone, most people do not make a careful distinction between adat and Islamic rules. Frequently the rules are hopelessly confused, adat rules being labeled Islamic, and vice versa. In a political and cultural sense, such popular labeling is correct, for what is at issue is the authoritative base of the rules—that is, the principle of legitimacy under which men live.

[13] See the very enlightening article by Taufik Abdullah, "Adat and Islam: An Examination of Conflict in Minangkabau," *Indonesia* 2 (October 1966): 1–25. Abdullah argues convincingly that the conflict between adat and Islam in Minangkabau should be regarded not as a simple struggle by distinct forces, but as a deep tension within a single social system.

Labeling a rule adat or Islamic, which people seldom do consciously, implies a religious and political choice, and it does not matter in this perspective whether the designation is doctrinally correct. The choice and the labeling become more imperative when a conflict over authority occurs. In the past, whenever Islam was on the rise, possibly riding a wave of urban commercial growth, Islamic law quickly became a major issue. In Minangkabau country the nineteenth-century Padri War was one outbreak of such contention. The less violent but still bitter challenge of modernist Islamic groups to Minangkabau social structure in the twentieth century continued the struggle after a respite of decades. Minangkabau matriliny makes it inevitable that inheritance law should be a dominating symbolic focus of conflict there, and when the struggle declines, an effort is made to work out an area-wide compromise on inheritance problems.[14] Islamic courts still do no (or very little) inheritance work in Minangkabau villages, though in the cities of Padang and Bukittinggi they evidently do receive cases.[15] In other areas of Indonesia, inheritance is less of an issue, but it remains important in a more general demand for obedience to religious law by Islamic groups. Local conflicts over authority, represented by support and opposition to Islamic law, are writ large in the national political party system, organized predominantly around Islamic and non-Islamic symbols. As Geertz has argued, the ideological base of the party system feeds back into potential local conflict, reinforcing and exacerbating it.[16]

In the wider perspective of law in society, then, how much influence Islamic inheritance law has had on customary law is basically a secondary question. It is *not* an insignificant question in the light of economic and social change. But for Islamic groups the essential problem is the extent to which authority in society is vested in Islamic institutions. There is no general agree-

[14] For the most recent attempt to deal with Minangkabau inheritance law, see Mochtar Naim, ed., *Menggali Hukum Tanah dan Hukum Waris Minangkabau* [Developing—literally, mining—Minangkabau land and inheritance law] (Padang: 'Sri Dharma, 1968).

[15] Nancy Tanner, "Disputing and Dispute Settlement Among the Minangkabau of Indonesia," *Indonesia* 8 (October 1969): 21–62, at p. 51.

[16] Clifford Geertz, *The Social History of an Indonesian Town* (Cambridge, Mass.: The M.I.T. Press, 1965), pp. 10–11 and passim. Also Daniel S. Lev, "Political Parties in Indonesia," *J. of Southeast Asian History*, Special Issue, August 1967.

ment among Islamic leaders on the exact nature of this problem, as will be indicated later on in this and in our concluding chapter. Yet there is agreement that Islam has been held at bay, and one indication of this is the generally depressed role of Islamic law. It makes little sense to argue that Islamic inheritance law, above all, is commonly accepted in Indonesia. Too much evidence exists to the contrary, and only men with blinders insist that it is so. The terms under which Islam spread in Indonesia did not include total reconstruction of family institutions.[17] Usually, knowledgeable Islamic leaders admit that local custom deviates from the Sjariah. There is a place in Islamic legal doctrine for local customary law. But, such men are prone to say, when an issue is brought to court in an Islamic country, Islamic rules must apply.[18] Not only that, the best guarantee that Islamic rules will be applied is to have them applied by Islamic courts. It is not merely rules that are at stake, but a symbolic recognition of legitimate Islamic authority, with which the rules remain bound up, still, in Islamic political thought.

The political frustration of Islam in Indonesia is reflected clearly in national legal doctrine, doctrine that originated in the colonial period but is naturally maintained by the political and bureaucratic elites who have dominated the independent state. For those involved in the world of Islamic law, the doctrine itself has become a prime object of scorn and frustration. The reception principle of colonial adat law theory is commonly regarded by Islamic legal thinkers and administrators as a major and infuriating obstruction to the growth of Islamic law—and therefore of Islam. This principle states that Islamic law is valid anywhere in Indonesia only to the extent that it has been re-

[17] Cf. G. W. J. Drewes, "Indonesia: Mysticism and Activism," in G. E. von Grunebaum, ed., *Unity and Variety in Muslim Civilisation* (Chicago: University of Chicago Press, 1955).

[18] There is of course a continuum of attitudes among Muslim leaders with respect to the extent to which the law must be followed. Between the extremes of "none at all" and "all that the Koran requires" are those who would have only Islamic courts apply Islamic law, those who would have other state institutions incorporate some religious law, and those who would have Islamic courts apply Islamic law moderated by conciliation. For Kijai Adnan, the former chairman of the Mahkamah Islam Tinggi, for example, it was perfectly legitimate for Islamic courts to rely on conciliation procedures that would admit a considerable place for local custom. Only if a dispute were insoluble by any other means, in his view, should Islamic law be implemented. (October 24, 1960.)

ceived by adat law and thus has become adat law. Considerable learned vituperation is spent by Islamic critics on the doctrine of adat reception and its principal sire, B. ter Haar. In a comment on proposals for a new family-law regime in the Eight Year Plan of 1960, Professor Hazairin, a well-known Islamic legal scholar from the University of Indonesia law faculty, gave a standard Islamic view of adat reception theory.

> For people imbued with the spirit of Islam, setting aside the *fara'id* [inheritance] rules is the same as setting aside the factor of the Almighty God, the same as trodding on the Pantjasila [national statement of ideological principles], the same as sullying the all holy Quran, the same as oppressing its faith. . . . Another problem which greatly disturbs and antagonizes the faith of Muslims is the "reception theory" established by Dutch colonial authority in order to obstruct the progress of Islam in Indonesia. According to that reception theory Islamic law per se is not law; Islamic law can only be recognized as law if Islamic law has become adat law. It depends upon the willingness of local societies to make Islamic law that is not law into adat law. The reception theory, which has become the flesh and blood of Indonesian jurists trained during the colonial period, both in Djakarta (Batavia) and Leiden, is in fact a theory of the Devil. It affronts the faith of Muslims, it affronts Allah, it affronts the Quran, and it affronts the life of the Prophet. Without any doubt in his mind, Muhammad immediately obeyed the law imposed by his God, and people who are reluctant to obey the law of Allah are labeled *Kafir* by the Quran. . . . As an example of the goals of the reception theory, one might say: O Muslims, even though the Quran forbids adultery on pain of criminal sanction, don't worry about committing adultery as long as by the adat of your society adultery still is a matter of choice. . . . Supporters of the reception theory pointed to the situation of adat among Muslims, for example Muslims in Java, to whom Islamic inheritance rules were applied only if they went to an Islamic court, but who, if they divided an inheritance in the village, followed adat law. Look [said advocates of the reception theory]: the *fara'id* law is not yet received by adat law and is therefore not the law that applies; therefore, Islamic courts must be separated from their jurisdiction over inheritance. And so there arose Islamic courts with competence only over *nikah*, *talak*, *rudjuk*, *mahar*, and *wakaf*. Thus were the intense efforts of the great Islamic kings of old Java to spread Islam among their people brought to a stop by the colonial

> government since 1937. Why was Islamic inheritance law difficult to implement among the village people of Java? [Because according to adat protagonists, the people found it difficult to learn Islamic inheritance law, which requires considerable study, etc. Hazairin dismisses this argument by saying that he, a professor of law, does not know and understand many statutes now in force.] . . . If Islamic law for Muslims did not have to be based on "reception" or "knowing" . . . then Islamic law must apply to Muslims just as other laws must apply to the citizens or inhabitants of this state.[19]

Hazairin went on to argue that actually, because the People's Consultative Assembly (which passed on the Eight Year Plan) had admonished lawmakers to pay attention to religious factors in establishing new family law, the reception theory had gone by the board. Nothing could have been further from the truth, however. The reception theory means that civil courts will determine how far people accept Islamic law. But much more than that, it also identifies the locus of legitimate authority altogether outside the ken of Islam.

In this picture inheritance law is especially important, because it recurs with all the consistency and universality of death, because it does have economic consequences, and because it hinges on questions of social organization and values that are essential considerations for those who take Islamic law literally and seriously in the Islamic struggle. It is not surprising that the decision of the colonial government to remove jurisdiction over inheritance from Islamic courts caused far greater distress among Muslims than the decision to remove jurisdiction over *wakaf* affairs. As was argued in the first chapter, the inheritance competence of Islamic courts, whatever the quality of those courts, was regarded as ground won for Islam, in a critical historical social and political sense rather than merely a narrowly legal one. For the same reasons, the Ministry of Religion and Islamic groups fought hard to include inheritance in the jurisdiction of the new Islamic courts created outside of Java by Government Regulation 45/1957. The opposition to political Islam fought as hard to exclude inheritance and, when Islam won on this issue, to limit the significance of the Islamic victory.

Today inheritance in the courts continues subtly to raise

[19] Prof. Hazairin, *Hukum Kekeluargaan Nasional* [National family law] (Djakarta: Tintamas, 1962), pp. 4–6.

important ideological issues. Authoritative decisions must be based on a choice of rules. Here the choice of rules—whether Islamic or adat or something else—implies a choice of political (and religious) authority. If a choice of courts is also possible, as it frequently is in practice, not only in the outer islands but in Java itself, the political significance of the choice may be (though not always) particularly clear.

More than any other issue of law, inheritance represents the old struggle between Islam and adat, which, transposed to the present day, means the struggle between Islamic and "national" principles.

INHERITANCE IN THE ISLAMIC COURTS

The impression needs to be corrected at the outset that the statutes of 1937 and 1957 are anything like full expressions of reality. Rather, they represent skirmishes that have occurred in a long and continuing struggle. It is a struggle, in legal institutional terms, that civil courts probably will win. But the Islamic judiciary is putting up an interesting fight, even if not entirely on its own initiative.

What is striking is that in Java, where Islamic courts formally lost their jurisdiction over inheritance in 1937, they continue to handle inheritance cases on an impressive scale. In fact, most *pengadilan agama* set aside one or two days per week during which they receive only inheritance problems. It may well be that in several *kabupaten* Islamic courts receive many more inheritance issues than local civil courts. Sketchy statistics are available on inheritance in religious courts and they will be mentioned later in this chapter. But first, in discussing the inheritance work of Islamic courts a distinction has to be made in order to clarify what it is that religious courts do.

Two categories of inheritance problems come before Islamic courts everywhere in Indonesia. First, in most cases no real dispute exists. Rather, when someone has died, his family may ask the religious court, if not a more readily available expert from the village or the Kantor Urusan Agama (KUA), how the estate should be divided according to Islamic law. The court gives the requestants a *fatwa,* or advisory opinion, stipulating which heirs should receive how much of the estate. No statutory provision regulates these *fatwa,* and the procedure has developed largely by convention. Increasingly, now, *fatwa* are written up

fully and formally, with some such heading as "Document of Heirs," or "Document Concerning Division of Inheritance by Agreement." Two typical *fatwa* follow, one a simple determination of heirs and proper portions, the other involving a gift. Both *fatwa* are from the *pengadilan agama* of Surabaja, though many similar documents are available from other courts in Java and elsewhere.

> The requestants and their witnesses testified before the court that an Indonesian Muslim male, named Nahib, died in Surabaja on 12 May 1964, leaving the following heirs: a wife, three brothers, and three sisters. There are no other heirs, as the parents of the deceased are already dead and the deceased and his living wife had no children. The deceased left an estate consisting of a house and land located at ———, with title number ———. Those entitled to shares of the inheritance are the heirs listed above. And on the agreement of all these heirs, . . . the estate is hereby divided as follows: the estate is made up of thirty-six parts, of which the wife receives 9/36, each brother 6/36, and each sister 3/36. Therefore the above-mentioned house and land now belong to the heirs here determined. The ownership portion of each is according to the shares listed above. [1964]

> The requestants and their witnesses testified before the court that an Indonesian Muslim female, named B. Pairah, a widow, died in Surabaja on 24 May 1960, leaving the following heirs: a son, SU, forty-five, and a daughter, Dj, forty, the requestants. There were no other heirs, because the parents of the deceased had already died. The estate of the deceased consisted of a house and land. . . . The heirs of the deceased B. Pairah are SU and Dj. But on the full agreement of these heirs, intentionally and knowingly made, the above house is given over as a gift (*hibbah*) to the grandson of B. Pairah, the son of Dj. . . . This *hibbah* has been pronounced by the proper heirs above and accepted by the receiver of the *hibbah*. SU and Dj therefore no longer have any right over the above-mentioned estate, which belongs in full to the son of Dj. [1964]

Fatwa issued by Islamic courts may cover and resolve as many kinds of inheritance issues as parties bring to court. Not only are proper heirs and their portions determined, but if the heirs wish, a judge may help them to divide the estate piece by piece. Gifts and wills may also be worked out with the assistance

of an Islamic judge. All this is despite the fact that Islamic courts in Java have no formal jurisdiction over any of these sorts of legal action, and those in the outer islands have no authority actually to rule on the disposition of property. The informal competence of Islamic courts is seldom challenged, however; it is, after all, voluntary. Moreover, few people who might oppose it are aware of its extent. Under the cover of unofficial assistance, then, the courts can and do accomplish a large volume of inheritance work. Although a *fatwa* rendered by the courts is always based on Islamic rules, judges usually have no objection to helping those who come before them work out any kind of compromise. The unofficial *fatwa* is thus a very flexible tool. It is worth adding that this service performed by Islamic courts, whatever other political and social significance it may have, also relieves civil courts of a considerable burden of additional cases that might eventually wind up in civil court were it not for prior resolution by religious judges.

The second category of inheritance problems brought before Islamic courts consists of real disputes. In Javanese Islamic courts where judges or clerks are bureaucratically oriented, inheritance disputes are usually referred immediately to the local *pengadilan negeri*. But far more than occasionally, Islamic judges are perfectly willing to accept disputes and, in effect, to try them. The end result is still, on the surface, a *fatwa*. The difference is that there is a winner and a loser, and the latter may decide to go to a civil court for a superseding decision. Later in this chapter we will deal with the problem of why people bring their inheritance disputes to Islamic courts in Java, despite their lack of jurisdiction. Here the question is why Javanese Islamic courts themselves accept inheritance conflicts, when they do, and by extension how they conceive the purpose, apart from social service, of their considerable inheritance work.

An informal distinction exists in the *pengadilan agama*'s work between legal jurisdiction over matrimonial affairs and, in Java-Madura, advisory practice in inheritance affairs. It does not always operate this way, however. The formally distinct roles easily become confused, and not always by design, though this too enters the matter. As many Islamic judges are eager to acquire formal competence in inheritance issues again, they tend to encourage inheritance work in order to strengthen their case. But equally or more significant, in practice the judicial role tends

to dominate and to infiltrate the "advisory" role. Consequently, inheritance "*fatwa*" often take the form of decisions and are regarded as such by amenable (or unknowledgeable) litigants. The legal—better, judicial—environment of the *fatwa* is influential in turning it into a decision. What is more, because *fatwa* per se are unenforceable, Javanese Islamic courts have resorted to a kind of ancillary agreement by the parties to make it enforceable. That is, to strengthen a *fatwa* and to give it what nearly amounts to the binding power of a decision, a caveat is often entered and signed by the parties, that they shall not further contest the *fatwa*. As an agreement, rather than a court-issued *fatwa*, it can be enforced in civil courts. The extent to which advisory and judicial modalities and forms, *fatwa* and decision, become mixed in inheritance work by Islamic courts is reflected in the following notes on an interview with the chief judge of the *pengadilan agama* of Semarang, provincial capital of Central Java.

> The judge said the court has no power to decide (*memutus*) inheritance cases. . . . A *fatwa* given to people is always followed by them, he said, because they are not in conflict. He showed me a recent *fatwa*. It was written, as usual, as an officially stamped document. The form of it was obviously influenced by civil court decisions. It contained a whole list of *mengingat* and *menimbang* ("whereas" and "in consideration of") concerning pertinent Sjafi'i rules and also Wirjono's *Hukum Warisan di Indonesia* (a book on Indonesian inheritance law by the then chairman of the civil Supreme Court). Following a list of the total value of the estate, those entitled to inherit, and the portion of each heir, at the end of the three-page *fatwa* was a paragraph which the heirs had to sign. It was to the effect that the parties accepted the decision (*putusan*)—not *fatwa*. And they agreed not to challenge the dispositions made in the *fatwa* now or hereafter. The judge said that after 1950 there was a problem in what form to write up *fatwa*. Finally a PA (*pengadilan agama*)—he thought it was Pekalongan—drafted one and sent it to the Directorate of Religious Justice, which accepted it as standard.[20] [June 28, 1960]

[20] The form of the *fatwa* is now fairly standard, but word changes —like that of "decision" for "*fatwa*"—do occur. At first glance *fatwa* look quite like civil court decisions. In Java of course *fatwa* are not subject to appeal. In the other islands, where Islamic courts do have competence in inheritance disputes, lower Islamic court inheritance decisions can be appealed.

Such role confusion is not consistently apparent in Java. Some judges are more willing than others to try inheritance conflicts. A usually quiet tension exists between a more aggressively or militantly political (and religious) and a more bureaucratic, formal, norm-oriented posture on the part of Islamic judges. The differences and tension were evident in a discussion with an Islamic court chairman and the former chairman of the same court in Tanggerang, close by Djakarta. Hadji D., the former chief judge, was a militant as Islamic judges go.

> Hadji D. launched an attack on the present condition of Islamic law and courts, especially with respect to inheritance. He condemned *tjamats* and *lurahs* (village heads) because they settle inheritance disputes themselves, often in collusion, on the basis of any variety of law, rather than send disputants to Islamic courts as they should. D. thinks that when an inheritance dispute arises, the matter should immediately be referred to a *pengadilan agama*, which should then issue a *fatwa*. The disputants would accept the *fatwa*, said D., and proper backing from the *tjamat* and *lurah* would assure compliance if the disputants were recalcitrant. Sometimes, the *lurah* and *tjamat* refer to a local *kijai* for advice on Islamic law, but D. said these *kijais* in the *desa* (village) know little and often give wrong advice. D. then showed me one of his own *fatwa* in a case from 1958 and said this is the way things should be handled. He conceded that, of course, if disputants will not accept a *fatwa*—though he emphasized they usually will unless encouraged to claim everything by a *pokrol bambu* (bush lawyer)—then the case must go to a *pengadilan negeri*. At this point the present PA chairman mentioned that when he gets a request for a *fatwa* in an inheritance case, if he thinks the disputants will not willingly agree to accept the *fatwa* he simply sends them to the *pengadilan negeri*. It is senseless, he said, for him to write a *fatwa* unless people will accept it; rather than have a dispute go undecided, it is best to send it directly to a court that can give an enforceable decision. His view was in opposition to that of Hadji D., who feels that Islamic judges are responsible for giving *fatwa* in all cases and trying to convince people they should follow them. The present PA chairman is not the outspoken and scholarly type Muslim Hadji D. is, and seemed to me to be much more the *pegawai* (bureaucrat, official, civil servant). [Nov. 2, 1960]

Impressionistically, it is probably true that most Islamic judges believe that inheritance competence should be restored to Is-

lamic courts. But the more zealous judges, sometimes with encouragement from elsewhere in the religious bureaucracy, have never really stopped trying inheritance cases, disputes, albeit under cover of *fatwa*. They do so not merely for reasons of bureaucratic ambition, but because they believe it is right, even obligatory, in Islamic terms.

Unlike the situation in Java, religious courts in the outer islands are competent in inheritance disputes, but even there they transgress the boundaries of their formal jurisdiction. Their real limits, as in Java, are imposed by three factors: bureaucratic containment by civil courts, the demands of their clientele, and their own and their clientele's religious zeal. Although outer-island Islamic courts have no competence actually to dispose of heritable property, case after case occurs in which they do so anyway. To do so follows naturally from their original competence to determine who should inherit how much; and when parties before the courts request help in dividing the property, rather than merely determining shares, there seem to be no good reasons for refusing. If such decisions are contested, however, civil judges *may* rule the Islamic courts out of bounds and try the issues anew. Whether civil judges do so depends on other influential factors, such as their attitudes toward Islam and toward formal law.

In Atjeh, where Islamic courts have been expansionist since their start during the revolution and receive political support from powerful Islamic sentiment, the courts have consistently gone beyond their statutory mandate. As this book was being completed, an article appeared by the civil appeals court chairman of Medan, Judge Mahadi, who protested the extent to which Atjehnese Islamic courts have ignored the limits of their formal competence. The fault, he argued, lay with Government Regulation 45/1957, which established the religious judiciary outside of Java.

> As a result of the lack of clarity of P.P. 45/1957 in determining the competence of Islamic courts, there are indications that in Atjeh Islamic courts dealing with inheritance not only determine the portion of an estate to which each heir is entitled, but moreover directly divide the estate, and even go so far as to rule that such and such part of the inheritance shall go to this or that heir. . . . Is it not time to regulate the proper authority of Islamic courts for all Indonesia in a statute [*undang-undang*]? I think

the time has come for the relevant instances to think about this in connection with the formation of national law.[21]

Given the reasons why Islamic courts go beyond their formal jurisdiction, however, there is little evidence for assuming that a rationalizing law will change very much.

INHERITANCE AND RELATIONS BETWEEN ISLAMIC AND CIVIL COURTS

Civil and religious courts do not have much contact with one another. But when they do, how they get along does not depend solely upon statutory distribution of authority and functions. Often, and more critically, it depends upon the political, religious, and institutional attitudes of civil judges. Civil courts have sufficient formal authority to impose limits upon Islamic court activities when relevant cases come before them. That they will do so cannot be taken for granted.

In Java inheritance *fatwa* have been common long enough for many notaries and civil judges to accept them as proper evidence of ownership and claim. This is a purely conventional development, governed not by statute but by utility in social conditions that render any documentary evidence valuable in court. Moreover, when civil and religious judges are on good terms, or the civil judges have no strong feelings against Islam, or are merely concerned with the convenience of litigants, they may indeed invite parties before them to ask the advice of an Islamic court before undertaking an inheritance case in the *pengadilan negeri.* In some cities civil court clerks are instrumental in sending litigants to local Islamic courts to settle inheritance problems, including disputes. Heavy backlogs in civil courts mean that inheritance cases may take years, counting appeals, in contrast with a few days or weeks in Islamic courts.

While such cooperation is not rare, it is not all that common either. Civil judges with prewar legal training particularly, or who are in any way politically hostile to Islam, tend to be contemptuous of religious courts. They also incline to the view that Islamic inheritance law has no place in Indonesia and that Islamic courts should have no role at all in inheritance. For many

[21] Professor Mahadi, "Wewenang Pengadilan Agama" [The authority of Islamic courts] in *Hukum Nasional* 3, no. 2 (April-May-June, 1970): 5–18, at p. 17. *Hukum Nasional* [National Law] is the internal journal of the National Institute of Legal Development (L.P.H.N.).

Javanese civil judges, the inheritance issue was settled to their satisfaction in the 1930s. In the notes that follow, taken from interviews in civil and religious courts in Java, the intensity of feeling expressed clearly involves contention over more than mere legal issues.

> [PA clerk in Djember, East Java] I asked about relations with the local civil court. He said there were none. The *pengadilan negeri* doesn't even come to us for advice about inheritance cases, he said. It settles cases according to adat law. [Nov. 29, 1964]

> [Civil judges in Banjumas, Central Java] One judge said that in Magelang the *pengadilan negeri* at times issued enforcement decrees for inheritance decisions (*putusan*) of the *pengadilan agama.* This surprised the other judges, who said that in Banjumas Islamic court *fatwas* concerning inheritance have no validity, not even any evidentiary value, because of the PA's lack of competence in inheritance issues. Pak S. (the retired and highly respected former chairman of the Banjumas civil court) said that Islamic courts often try to decide inheritance cases. Before the war their competence was restricted to NTR. But after the revolution, Islamic courts started a drive to get back their jurisdiction over inheritance. This is the result of a postrevolutionary desire on the part of all government offices to obtain as much power as possible. But no party is any way legally bound by the terms of a *fatwa.* [July 13–14, 1960]

> [Judge on the civil appeals court (*pengadilan tinggi*) of Surabaja] Recently a litigant in Bondowoso (East Java) advanced a PA *fatwa* as proof of his right. The first instance civil court refused to accept this *fatwa* as valid proof, since the PA is not competent in inheritance litigation. The PA's are constantly trying to regain jurisdiction over inheritance. It would mean much money for the Mosque treasury. [Nov. 7, 1960]

Outside of Java the situation is essentially the same, but more complex because of other variables. In some areas of the outer islands—Atjeh and South Sulawesi, for example—Islam is relatively stronger than in Java, and where this is so and Islamic courts are active, civil judges tend to treat them delicately. In part this is because of concern over possible Islamic ire. But in addition, judges raised in these areas may be more sympathetic to Islam, or anyway not especially hostile to Islamic institutions.

When this is so, cooperation is easier between civil and religious courts. *Pengadilan negeri* judges in parts of Sumatra, Sulawesi, Kalimantan, and other islands regularly send disputants in inheritance cases to Islamic courts for preliminary advice before rendering final decisions. Such procedure often follows from a doctrinal assumption that Islamic inheritance rules have been received by local adat law. Civil judges in the Palembang area, for example, have inclined to this view, though there are fervent exceptions. One Palembang judge, by origin a Minangkabau, explained the way he proceeded in inheritance cases:

> The people of Palembang follow Islamic law in inheritance issues, he said. In fact, the *pengadilan agama* decides who are heirs and in what proportion of an estate. The judge said he sends people with inheritance problems directly to the *pengadilan agama* for a decision before he decides the case with respect to actual disposition of property. Thus all inheritance cases among Muslims in Palembang are decided first by the *pengadilan agama.* When I expressed some doubt, he said that, at least, this is how he handles inheritance cases. He was not certain how other judges regarded the matter.[22]

Still, the assessment civil judges make on such issues depends, in varying degree, upon their personal and political attitudes with respect to Islam. A judge hostile to Islam may doubt the local influence of Islam, unless it is overwhelmingly apparent. Accordingly he will lean jurisprudentially to local adat rules, if they are in fact different from Sjariah rules. Or he may apply

[22] This same judge, however, did not feel bound by the entirety of the Islamic inheritance law. He told me of an interesting case he had decided earlier, involving an Arab family in which eleven siblings were heirs to their father's estate. One brother died, leaving two children. Their grandfather, the deceased, indicated before death that he wanted the two children to inherit the portion of their father, but he did not write a will nor formally give them a gift (*hibbah*) of the property. Islamic law prohibited their succession. The judge nevertheless ruled that as the grandfather wanted them to have their father's share, therefore a portion of the estate could be regarded as a *hibbah.* But the question arose: How much? Here the judge turned to the European civil code (Burgerlijke Wetboek) for the principle that legitimate heirs should not suffer in the distribution of an inheritance. On this basis he awarded the two grandchildren collectively two-thirds of the share received by each of the primary heirs. Everyone was evidently satisfied with this solution. (August 10, 1960.) Civil court jurisprudence is replete with such instances of eclectic source searching for applicable legal principles, particularly in inheritance issues.

Islamic rules but emphasize their reception by adat law or simply deny that they are actually Islamic rules at all.[23]

Institutional sensitivities, distinct from religious sentiment, seem impressionistically to count for more in outer-island districts than in Java, though they are hardly absent from Javanese civil courts. Where Islamic courts *are* competent in inheritance disputes, sharing jurisdiction with civil courts, civil judges occasionally feel more competitive with *pengadilan agama*. Even judges who are open to the argument, say, that a growing post-revolutionary "individualism" leads away from traditional adat toward Islamic law, may be strongly opposed to the inheritance competence of Islamic courts. Such judges are often willing to apply Islamic rules themselves, but they object to the existence of a shared jurisdiction. Civil and religious judges both in the outer islands are in the habit of claiming that their courts handle the larger proportion of inheritance disputes.

Given the opportunity, a hostile civil judge can easily harass the religious judiciary and make things difficult for litigants inclined to resort to Islamic law. When requests are made for enforcement decrees, civil judges may regularly insist upon examining the procedural correctness of Islamic court rulings. It is not hard to find errors. A civil judge might then order a case tried anew in his own courtroom. Or a similarly inclined judge may attempt to convince a litigant that local adat rules are really

[23] The importance of the symbolic source of authority for a rule was brought home to me time and again in discussions with people who feel strongly one way or the other about Islam. For example, the problem of inheritance rights for adoptive children (*anak angkat*) once came up in a conversation between a well-known Central Javanese advocate (a former civil judge) and myself. He was a nominal Muslim but regarded political Islam as a threat. His religious orientations were essentially syncretic, though his father had evidently been a devout Muslim. The advocate had denied that Islamic law had much influence in Java. But on the question of adopted children, he mentioned his own strong feelings that biological relationship should determine inheritance rights, so that an adopted child should be excluded from succession. When I pointed out that Javanese adat law often permitted adopted children to inherit and that his views accorded with those of Islamic law, he quickly stated that he knew nothing about Islamic law—though he had in fact studied it in the law faculty—and that he certainly did not regard his attitudes on the matter as being in any way related to Islam. (July 25, 1968.) Similarly, devout Muslims who divide an inheritance according to local custom often rationalize the solution as a matter of Islamic *islah*—compromise. The adat or Islamic cloak over contrary rules represents a choice of political symbols.

more advantageous to his case than Islamic law.[24] Frequently this is quite true, tempting a litigant disadvantaged by Islamic law to bring a new suit in the local *pengadilan negeri* on the basis of an adat rule. Jurisdictional pluralism lends itself naturally to this sort of competition; evident losers in litigation need little encouragement to try their luck elsewhere.

On balance, relationships between local civil and religious courts, when the courts relate to one another at all, tend to reflect local religious and political attitudes. Institutional rivalry seldom is blatant, but represents a kind of grumbling undercurrent that occasionally breaks through the surface calm. When it does, it is usually expressed in terms that connect the problem with wider issues of political authority and sources of legitimacy in the unitary state. Inheritance brings the twin issues of civil courts versus religious courts and adat law versus Islamic law together in complex ideological, political, religious, and legal ways, producing a constant, usually low-grade, tension in legal institutional life. Such tension is linked to grander analogous issues of political conflict in the Indonesian state.

SOCIAL BASES OF ISLAMIC COURT INHERITANCE JURISDICTION

By "jurisdiction" here I do not mean formal competence but competence in the minds of those who use Islamic courts, whether or not they are legally authorized to hear cases. There is no question but that going to a *pengadilan agama* for help in inheritance affairs is troublesome, in Java and in the other islands as well. In Java it is always possible for a hostile requestant or litigant to deny the jurisdiction of Islamic courts altogether, forcing a complete rehearing in a *pengadilan negeri.* Outside of Java, should a litigant refuse to comply with an Islamic court ruling, assistance must be asked of the local civil court for execution. Nowhere in Indonesia do Islamic courts have enforceable

[24] An appellate judge from Surabaja told me that when he was on a first instance court elsewhere in Java, an inheritance case once came before him in which two male heirs asked that Islamic law be applied. About thirty female heirs agreed, until the judge explained that by Islamic law the females would get nothing, or next to nothing, because they were removed a few degrees from the original owner of the property. All the females thereupon demanded that the more favorable adat law be applied, which the judge was happy to do. In inheritance cases before *pengadilan negeri* in Java litigants may specifically request that Islamic law be applied, but they rarely all agree to do so.

authority to call witnesses or anything of the sort. They must always refer to civil courts in case of need for executive machinery.

Yet, despite all the difficulty and inconvenience, Islamic courts do not want for inheritance cases. Available statistical data do not allow for a comparison between inheritance case loads of civil and religious courts. Impressionistically, though—judging mainly from the estimates of civil and religious judges—they probably do approximately equal inheritance work. At least, there is no evidence to demonstrate on a national scale that civil or Islamic courts dominate the inheritance scene. In some Javanese *kabupaten*, Islamic courts resolve as many as ten times more inheritance cases per year than local civil courts, but this is because few Islamic court cases are disputes and, moreover, Islamic courts work much faster than civil courts.[25] In some Sumatran districts, Islamic courts handle fewer inheritance cases than local civil courts, despite the fact that both courts have jurisdition. The comparative case-load situation varies from *kabupaten* to *kabupaten*. It depends on several variables, such as local tradition, the presence of prestigious ulamas and *kijai*, the character of local religious judges, and so on. For outer-island Islamic courts there is some statistical data on inheritance cases, by major province, as shown in table 4. If these figures are correct, they show an upward trend from the initial period of court organization in 1957–1958.[26] But it is not clear how many of these cases are really amicable settlements with court advice. Nor can one tell how many cases also went through civil courts.

[25] According to very rough statistics gathered by the Directorate of Religious Justice, in the period 1950–1954 the *pengadilan agama* of Pemalang, Central Java, delivered 112 *fatwa* while the local *pengadilan negeri* decided only 28 inheritance cases. In Kebumen, Central Java, the Islamic court issued 75 *fatwa* against the civil court's 62 decisions. In East Java the Islamic court of Ponorogo recorded 42 *fatwa*, the civil court 38 decisions. In a number of Javanese *kabupaten*—Blitar, Djombang, Lamongan, Situbondo, Surabaja, Magelang, and others—the *pengadilan agama* reported anywhere from ten to forty *fatwa* per year in the early 1950s. From 1954 to the present no further data is available on inheritance problems in Javanese Islamic courts.

[26] The table excludes Islamic court inheritance cases from smaller islands, among them the Lesser Sundas east of Java. No comprehensive data was available to me for these areas, but scattered figures indicate that Islamic courts there do considerable inheritance work also. In 1963, for example, the *pengadilan agama* of Lombok reported a total of thirty-one inheritance cases.

TABLE 4. INHERITANCE CASES

	1959	1960	1961	1962	1963	1964	1965
Atjeh	53	111	130	132	72	134	129
N. Sumatra	67	61	88	118	120	120	110
W. Sumatra	26	15	17	25	28	28	35
S. Sumatra	102	102	128	143	92	145	126
S. Kalimantan	1	14	30	25	49	27	30
E. Kalimantan & W. Kalimantan	14	50	71	70	91	73	75
Sulawesi	110	87	108	346	250	344	297

And without comparable data from civil courts, there is no way of assessing precisely the competitive position of the courts in inheritance jurisdictions.

Nevertheless, it is clear enough that Islamic courts do a great deal of inheritance work. But given the disadvantage of Islamic courts in inheritance, why do people continue to use them, not merely as an advisory but also as a contentious jurisdiction? The answer probably lies in the conditions and attitudes of the Islamic courts' clientele.

First of all, in Java there is widespread ignorance that a jurisdictional problem actually exists. Many people simply do not know that the *pengadilan negeri* rather than the *pengadilan agama* has competence in inheritance disputes. The memory that the *raad agama*, by which name Islamic courts are often still called, used to try inheritance cases has not faded altogether. In addition, common patterns of judicial traffic contain a rough empirical logic that popular knowledge is not equipped to challenge. While the *pengadilan agama* is well known for its handling of matrimonial cases, the *pengadilan negeri* is best known for dealing with criminal cases. Unless challenged, then, either by professional counsel, unlikely in most villages, or by information from *Pamong Pradja* offices, men tend to go to the court they know best for family matters.

Even in the *Pamong Pradja*, let alone urban middle-class groups, formal jurisdiction in inheritance matters is not always perfectly clear to all officials. One would expect a high level of awareness of legal propriety in the regional bureaucracy. But confident and experienced *Pamong Pradja* officials often are less oriented legally than pragmatically. Among those who do know about the distribution of judicial authority, frequently there is

no inclination to disturb existing patterns of court use. They tend to let well enough alone, as long as no local trouble occurs, unless they have strong ideological views on the place of Islam.

Second, unfamiliarity with formal procedure means that social-religious-political environment has great influence on choice of jurisdiction. It is this, along with religious and political commitment, that makes the colonial transfer of jurisdiction over inheritance from religious to civil courts only haphazardly effective in Java. Where Islam is strong, people often assume that the *pengadilan agama* is the *proper* court for inheritance cases, even though religious courts may in fact send disputes on to civil courts. Or the KUA may be asked for assistance. Where Islam is not strong, local authorities are more likely to be aware that the *pengadilan negeri* has jurisdiction.

> [Interview with the *kuwu*, chief, of Tjilimus village in Kuningan *kabupaten*, West Java. The local military commander joined in.] The *kuwu* said that it is the religious law (*hukum agama*) that applies in Tjilimus. Religious law includes two kinds of law—*islah* (compromise) and the *fiqh-hadiths* (Sjariah rules and traditions). A religious expert from the *kenaiban* (religious office) or elsewhere suggests settlement of disputes on basis of agreement between the parties, and the settlement can be any sort, but it is based on Islam. The *kuwu* knew the Islamic rules on inheritance and said they apply here because the people are Muslims. . . . If a dispute goes beyond the *desa*, it goes to the PA. The *kuwu* answered with certainty on this. But he said later that if disputants are not satisfied with the PA decision or still argue, they can go to civil court. I asked about differences between the *pengadilan agama* and *pengadilan negeri*. It was obvious the *kuwu* didn't know what the differences are in the law applied by PA and PN. And he was confused about why there are both anyway. The commander explained that in the PN witnesses and lawyers are used, while this is not so in the PA. The *kuwu* and the commander finally agreed there are no substantive differences; both the PA and PN apply Islamic law. [June 19, 1960]

> The *lurah* [of Glagahwero village in Djember *kabupaten*, East Java] said that he often has to settle disputes . . . about inheritance and explained how he goes about it. . . . He emphasized that his people are Muslims and therefore want Islamic law applied to them. But of course if the people cannot

> come to an agreement, the *lurah* suggests they go on to a higher instance. This higher instance is the KUA. Although he mentioned the *tjamat* too as a dispute mediator, his emphasis was on the KUA as a settler especially of inheritance disputes. . . . The people usually accept KUA decisions, though some who are not true Muslims challenge the KUA decisions at the *pengadilan negeri.* [Nov. 24, 1959]

> [Discussion with a *lurah*, a *tjamat*, and a policeman in the village of Sitapurna, Tegal *kabupaten*, Central Java. The *lurah* was not a devout Muslim, nor was the village noticeably inclined to Islam.] The *tjamat* said that he is sometimes asked to help solve difficult disputes. He implied that the natural course of disputes is from *lurah* to *tjamat.* When I asked, he said it was not necessary to call in the KUA. Disputes are settled by family or village authorities, but not by the *alim-ulama;* or disputes may finally go to court, but not the PA. . . . When I asked about differences between the way disputes are settled by village authorities and by *alimulama*, the policeman said that when ulamas settle inheritance disputes, they take a payment. The village never asks for payment. There are some differences in rules, he said, but Islamic inheritance rules are not followed in the village. [June 22, 1960]

Where Islam is strong, even when formal jurisdictional distinctions are known, the *pengadilan agama* (or KUA) may be sought out precisely because it is believed right. Here formal procedure is simply irrelevant. Religious resorts are legitimate and therefore have jurisdiction. Conversely, where hostility to Islam is common, religious jurisdictions are not only less used but overtly avoided. When religious-political tension in Java has given rise sporadically to local anti-Islamic cults, there have been reports of attempts to evade even the formally recognized competence of religious offices. Even the authority of the KUA over marriage and divorce has occasionally been rejected by followers of such groups as the "Pantjasila" religion and the like.

These points are imperfectly supported by imperfect statistics, which the Directorate of Religious Justice compiled in the mid-1950s, perhaps in order to build up a case for restoring the inheritance jurisdiction to Islamic courts.[27] The statistics,

[27] Islamic courts were asked to compile statistics on their own inheritance case load and the local *pengadilan negeri*'s work on inheritance and child support, over which Islamic courts in Java had also lost jurisdic-

consisting of reports from *pengadilan agama* throughout Java on the numbers of inheritance *fatwa* delivered from 1950 through 1954, were compared with support given the two major Islamic parties (Masjumi and Nahdatul Ulama) and the two major non-Islamic parties (Nationalists: PNI, and Communists: PKI) in the parliamentary elections of 1955. These data are too incomplete to be reported fully, but certain correlations were found in East and Central Java among twenty-three *kabupaten* in which Islamic courts had actually kept count, more or less roughly, of inheritance problems brought to them. There is no way of determining how many of these problems were disputes. What we have, consequently, is a measure of general social reliance upon *pengadilan agama,* but not one of intensity of commitment, which would be indicated by the incidence of actual disputes wherein litigants were willing to accept an Islamic court decision despite formal lack of competence. In fifteen *kabupaten* where Islamic courts delivered more than twenty inheritance *fatwa* per year in the period 1950–1954, ten gave more than 40 percent support to the PNI and PKI together.[28] But in the eight *kabupaten* where Islamic courts delivered fewer than twenty *fatwa* per year, none gave the PNI and PKI together less than 40 percent of the vote. Among the nineteen *kabupaten* where Islamic courts did not bother to record *fatwa* (possibly indicating a small volume of requests and some lack of interest) eight gave the Islamic parties over 40 percent electoral support, and eleven less than 40 percent, with one of the eight divided

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tion during the colonial period. The Islamic courts were also asked to report on *wakaf* problems brought to the *pengadilan agama* and to the *pengadilan negeri.* From the often sketchy data returned, it appears that a few *pengadilan agama* continue to register *wakaf,* while in other areas the local KUA do. Often *pengadilan negeri* judges refused to give statistical data to the *pengadilan agama* without direct orders from the Ministry of Justice, indicating the state of relations between religious and civil courts in those areas. Some civil judges may have been aware that the Islamic judiciary would use the material to argue for a return of the inheritance jurisdiction. At least eight Islamic courts reported that they referred inheritance issues directly to the *pengadilan negeri.* Ultimately the material did not prove very useful in supporting the demands of the Ministry of Religion, but the requests stimulated some PA judges to pay more attention to inheritance problems.

[28] The 40 percent figure was used because of the large number of minor parties, which usually drew from 10 percent to 20 percent of the vote. Support of the minor parties tended to balance out roughly between Islamic and non-Islamic political affiliations.

about evenly between Islamic and non-Islamic parties. These figures do not tell a very illuminating story. Often *pengadilan agama* judges refer inheritance cases to the *pengadilan negeri*, but equally often Islamic courts and local KUA's refer cases to one another and deliver *fatwa* unofficially. What is not evident at all from the above data is the influence of renowned local *kijai*, who themselves might give advice on religious inheritance rules or refer people to an Islamic judge.[29]

In any event, despite a high degree of local variation, Islamic courts are likely to be stronger than formal procedure admits wherever the social-religious environment is more inclined to Islam. Where religious conflict is relatively great, moreover, religious institutions may benefit from a reinforced commitment of adherents. The same is true of small communities of devout believers surrounded by larger and sometimes hostile groups. In the data for Central and East Java, *kabupatens* with relatively small Islamic support (less than 30 percent), as in Ngawi, Ponorogo, Madiun, Patjitan, Blitar, Surakarta, Wonogiri, Jogjakarta, among others) frequently have rather active Islamic courts and KUA offices. This may be due to the presence of a traditional center of Islamic attention, such as the religious school Gontor in Ponorogo, or elsewhere to a minority group tendency toward greater cohesiveness.

Along with religious sanction and unfamiliarity with formal procedure, a third factor favoring Islamic courts as a resort in inheritance issues is convenience and procedural flexibility. Unless there has been considerable ideological conflict and propaganda, most people do not usually distinguish between different sources of law. What is adat law and what is Islamic law, let alone what is national statutory law, is not paid much attention. Disputes are settled on whatever basis appears promising, and few seem to care what the substantive rule is, within certain limits. In the reality of a dispute men seldom talk about whether

[29] Well-known and popular ulamas are more often found on Islamic courts outside of Java, though even there rarely. Highly prestigious ulamas seldom lend their authority to Islamic courts, preferring to stand independent of the bureaucracy. Some have their own religious schools or lead Islamic brotherhoods. During the late 1950s and early 1960s, however, a very influential ulama was chairman of an Islamic court in Lahat, South Sumatra. Evidently his court did a great deal more inheritance work than either the local civil court or Islamic courts elsewhere in Sumatra. But I have no evidence for this other than secondhand reports.

adat law or Islamic law should be applied, unless the issue is specifically raised as the result of political conflict. When a dispute goes beyond a village, therefore, that resort is likely to be chosen which seems closest to the village way of doing things, and the label, again, is of no great concern. If a court rather than an administrative office is chosen, a *pengadilan agama* has the advantage of greater informality, familiarity, and unexcessive impressiveness. Islamic courts are usually small places, located near a mosque, full of people when sessions are held. Religious judges are more rural than urban in type; they are at least not imposing high officials. Moreover, they are more likely than civil judges actually to come from the local area they serve and to speak the local language. When their help is asked in an inheritance dispute, it is frequently because of their official yet comfortable rank as well as for reasons of religious propriety. It is not unusual for an Islamic judge to regard his function in inheritance cases as essentially a conciliating one, and he is as likely to consider adat norms as Islamic rules. This is as true in the outer islands as it is in Java.

> [*Pengadilan agama* in Medan, North Sumatra] The judge said that actually few inheritance cases are brought to his court, though it is competent by law. . . . Occasionally the PA serves to conciliate inheritance disputes on any basis desired by the disputants. That is, if they want to settle their inheritance problems according to adat law, the court will help them to work it out. . . . Such conciliation (*perdamaian*) does not follow Islamic law, and it is not considered a PA decision. It is only the good offices of the judge, who serves as a witness to the final agreement. [May 12, 1960]

> [*Pengadilan agama* of Surabaja, East Java] The judge was an older man with an authoritative demeanor. But the young and enthusiastic clerk (*panitera*) seemed to dominate; he often interrupted the judge and talked a good deal. The clerk asked how *gono-gini* (marital community property) is handled in American law. I expressed surprise that an Islamic court should be interested in this. The clerk and judge pointed out that divorce cases are hard to settle when it comes to division of property because both partners are angry when they divorce. Thus the court can seldom settle the matter; the couple may have to go to the *pengadilan negeri*, and they usually do. But the PA relies on conciliation in all inheritance cases, and this opens the way, as I suggested, for the use of adat rules. . . .

> The judge gave a basically local explanation of *gono-gini.* . . . He said that if the wife does nothing but cook, she deserves only one-third. Otherwise, he seemed to feel that one-half is fair. [Dec. 3, 1964]

In these notes, the discussion mixed two different legal problems, but the point is that Islamic judges are knowledgeable about local adat rules—they grew up in the area, after all—and they are not averse, by and large, to incorporating them into a settlement. Again, however, this assumes that no symbolic issue is raised.

Islamic courts, then, are also used as another handy and familiar kind of dispute-settling instrument. Along with other advantages, they are fast. It seldom takes an Islamic court more than a few days to work out an inheritance problem, while a *pengadilan negeri* may take months or years when there are appeals, as there usually are. Civil courts are too urban, too impressive, and too slow to be of much service as this kind of conflict manager. Serving such functions, however, brings Islamic courts into a procedural plane wherein substantive Islamic law is not really of much use. It may, in fact, be altogether irrelevant. But practically this means little. From an ideological point of view, substantive rules are less important than the authoritative symbol under which the court operates. For those who ask an Islamic court's help, whatever the court does is Islamic.

ISLAMIC VIEWS OF THE INHERITANCE ISSUE

Whether jurisdiction over inheritance should be restored to Islamic courts in Java has been debated now for more than thirty years. Islamic demands are not likely to meet with success. But it is nevertheless worth exploring the attitudes of Islamic policy makers and influencers on the matter, because they reflect greater uncertainty and lack of solidarity than is usually assumed. The ambivalence of Islamic leadership is one reason why Islamic courts in Java probably will not regain their lost competence. More than that, however, this ambivalence illustrates the subtle (and not so subtle) ideological and institutional problems of legal change in Indonesian Islam.

Islamic groups and the Ministry of Religion have pressed sporadically for the return of jurisdiction over inheritance to the Javanese *pengadilan agama.* Time and again political leaders have raised the question in Parliament and, before it was suspended in

1959, the Constituent Assembly. On various occasions the Directorate of Religious Justice also has taken up this issue with an obviously adamant Ministry of Justice. The various arguments have already been mentioned. For Islamic spokesmen it is a matter of religious obligation: Muslims should accept, and be encouraged by the state to accept, the legal consequences of their faith. Their opponents say, in brief, that Islamic law has not been received by Indonesian society. In reality, both sides of the debate take much else into consideration. On the Islamic side these other considerations militate against really challenging the status quo.

First is the question of the quality of Islamic courts, which has worried pragmatic bureaucrats in the Ministry of Religion and Islamic intellectuals both. Even as ministry officials gathered statistics to show that Islamic courts should have full authority over inheritance, they expressed grave doubts.

> [A first-line administrator in the directorate] Considerably more preparation is needed before the competence of religious courts is expanded. Religious judges have a varied education, mostly poor, and have not had broad legal training. Religious justice must be equipped with many well-trained men, who possess legal knowledge, general as well as Islamic. It is up to the Ministry of Religion and Islamic universities to provide these people, before trying to establish the *pengadilan agama*'s jurisdiction over inheritance and the like. [Oct. 19, 1960]

> Hamid [a penghulu in the directorate] insisted that there is no hope for Islamic courts until better-trained people become judges. It makes no sense to demand return of the inheritance jursdiction—and he does not think it should be returned yet—until religious courts are actually capable of handling such cases in a qualified way. This is not yet so. If inheritance is returned now, the situation may be worse than now or before, in that the courts [he implied] will lose favor with the people through their incompetence. [Nov. 2, 1960]

These comments also reflect a traditional Islamic view of the imperfection of *kadi* courts after the Prophet's era and, as well, an anxious comparison with more prestigious civil institutions.

Second, as always during this century, Indonesian Islam is intellectually divided on the question of religious law. With re-

spect to inheritance three positions stand out. One held by Nahdatul Ulama leaders and more or less generally in Islamic courts is that the law of Islam according to Sjafi'i doctrine must be maintained.

A second, promoted by modernist Islamic legal scholars, would have Indonesia create its own *madhab* distinct from the existing four Sunni *madhab*, which have dominated Islamic law since the tenth century. The leading exponent in Indonesia of this twentieth-century modernist cry for a new *ijtihad*—independent reasoning, in contrast with *taqlid*, submission to established doctrine—is Professor Hazairin. Among his proposals, one analysis has it that the Prophet actually intended the inheritance law of Islam to be bilateral rather than predominantly patrilineal, as most Islamic scholars believe. Hazairin's purpose appears to be to bring Islamic law into line with dominant kinship patterns in Indonesia, where family structure is bilateral in Java and commonly thought by some, including Hazairin, to be moving in this direction among unilineal groups in Sumatra and elsewhere.[30] Less radical views (for Indonesia) in the same reform category would pick and choose among the existing four *madhab*, as other Islamic countries have done:

> Professor Notosusanto [Gadjah Mada University law school] said that he feels inheritance should not go back to the *pengadilan agama* in their present condition, with ill-trained and otherwise limited judges.[31] He feels strongly that Islamic courts should not adhere only to the Sjafi'i *madhab*. The Sjafi'i spirit is too narrow. . . . If all four *madhab* are used, the courts can search out rules more in keeping with the Indonesian sense of justice and can deal better with legal problems which arise here. . . . But PA judges here are too nar-

[30] Prof. Dr. Hazairin, *Hukum Kewarisan Bilateral menurut Al-Qur'an* [Bilateral inheritance law according to the Koran]. (Djakarta: Tintamas, 1377/1958). Hazairin's arguments have stimulated considerable debate among some Islamic intellectual circles, but by many (not all) Islamic judges they are ignored.

[31] See also Notosusanto, *Peradilan Agama Islam di Djawa dan Madura* [Islamic justice in Java and Madura] (1953?), and *Organisasi dan Jurisprudensi Peradilan Agama di Indonesia* [Organization and jurisprudence of religious justice in Indonesia] (Jogjakarta: Jajasan Badan Penerbit Gadjah Mada, 1963). In the expansion of his first book to include Islamic justice in the islands outside of Java, Professor Notosusanto paid minimal attention to inheritance issues, indeed barely one page.

> row and unlearned. They are not sufficiently aware to be able to step out bravely and use the other *madhab*. Once in a case he tried to talk a judge into deciding on the basis of Hanbali rules, but the judge was afraid to do so. As it happened, another source was found in the Sjafi'ite books for the decision the court wanted to make. [Dec. 8, 1964]

A third view is that of Islamic intellectuals trained in civil law, who incline to the argument, often acquired in law school, that the Islamic law of inheritance has not in fact been received by local adat law and that it would be foolish to try to impose it. A Djakarta advocate who belonged to Masjumi before it was abolished in 1960 represents this position quite well.

> [I have] major disagreements with those who want to apply the Islamic law strictly in Indonesia. The narrow view of law that Islamic parties have is due to the ulamas [most of whom he regards as unlearned people, but nevertheless and unfortunately powerful]. But even ulamas get Islamic law mixed up with adat in their areas. . . . If PA's were ever given full competence over inheritance, and capable Islamic judges were found, then uniform law would be applied in all of these courts—Islamic law. But what untrained people in the party [Masjum] fail to understand is that there *are* big and important differences in the law people live by in some areas. So, for example, PA justice in inheritance matters is simply unacceptable in Minangkabau, where there is no inheritance to speak of, since all important property simply returns to the family. [He then said in effect that the Islamic law of inheritance could not be made to apply in Minangkabau without first destroying the whole matrilineal order there, which indeed some Islamic groups have wanted to do.] In his last years, the late Hadji Agus Salim [a famous elder of the modernist movement and of Masjumi] also came to regard the Minangkabau social system as a good one, though when he was young he wanted to wipe out these "ancient and backward" forms. H. A. Salim came to realize that Minangkabau society offers security to its members, because of the tightness of the family system. The family system guarantees its members that they will always have food and shelter, a kind of security not easy to find elsewhere. [July 28, 1960]

So far as inheritance is concerned, adat and Sjariah are basically different, and the Sjariah is generally not accepted, especially in Java, in the sense of justice of the people. Bring-

ing the Sjariah into harmony with the adat of the people is an insuperable task. And so it is better left alone. [Feb. 10, 1960]

This man's arguments are not typical of all modernist intellectuals in the old Masjumi, or its successor the Partai Muslimin Indonesia, only those with civil legal training and some other professionals. Nor are such views usually made public, though a younger, postrevolutionary, generation of modernists is beginning to speak out. The common standard displayed by party ideological spokesmen is that the Koran and *hadiths* are sufficient even to modern needs. But such points are asserted, not argued, and public debates within Islam over the place of Islamic law seldom occur. In any case, the doubts of influential lawyers and those who agree with them divide the modernist camp, albeit *sotto voce,* just as Islamic modernists and traditionalists are divided in a different way over the ideological issue of religious law.

Like the devout Muslim who has become a civil advocate, the one who has become a civil judge also tends to be skeptical about the cultural acceptability of Islamic law and the utility of Islamic law in the modern state. Both of course come out of the secular law faculties, and the roles of both are distinctly identified as civil and attached to civil authority. Such a skepticism is less ideologically than practically based, however. Religiously devout civil judges may, for example, be sympathetically inclined to Islamic inheritance law, but usually in the context either of its reception by adat law or its applicability to socially useful legal change, as the judges themselves see it. The notes below are from an interview with a Supreme Court judge, now retired but than active, a faithful Muslim of Central Sumatran origin.

He said that in considering the eventuality of new inheritance law and the like, one should not reject the Islamic law out of hand (as many civil judges do). In some places Islamic law is more just than local adat law. He was emphatic on this point, that judges should not assume uncritically that adat law must be followed, accepted as just, and eventually become national law. For example, in the case of widows, while adat law generally does not provide them with a clear right of inheritance, Islamic law gives them an eighth part of the estate. Women generally are given at least some sort of just treatment in Islamic law, while this is not always so in the adat. . . . Clearly he is

> thinking this problem out in his own mind, and his own sensibilities revolt against the treatment sometimes accorded to women in adat law. The only alternative to adat, as he seems to see it now, is the Sjariah. [April 8, 1960]

In practice another alternative is what the Supreme Court itself was then doing: to read change into local adat law. In any event, though this view is more favorable to Islamic inheritance rules, it does not conceive of these rules as being applied fully, but only here and there, and even then mainly as a kind of influence whose authority is not religious norm or sanction. On the contrary, civil judges who are believing Muslims have an obvious stake and considerable commitment to civil procedure. None that I have interviewed show any interest in Islamic courts.

Indeed, few of the arguments concerning inheritance law in Indonesia really have much to do with Islamic courts at all. Even those who challenge the quality of existing religious courts often do so rather mechanically, displaying a willingness to accept the status quo of inheritance jurisdiction in Java that raises questions about any concern over obligations to obey and enforce religious law. This is not to deny the depth of anger aroused in the 1930s when the inheritance jurisdiction of Islamic courts was shorn off. Nor is it to suggest that many Islamic leaders are uninterested in getting it back. Rather, our point is that arguments over the issue basically transcend institutional problems. They are rooted in much wider questions of culture and politics, and of the purview of Islam in modern Indonesia, about which there are simple convictions and painful doubts but little room for taking up these complex issues as complexly as they deserve. So much a part of Islam is the law that it is very hard, to say the least, for political and intellectual leaders to get beyond questions raised decades ago but never dealt with fully. This problem will be taken up again in the next chapter.

For their part, Islamic courts do rather much as society demands of them and as their institutional environment permits them, not very much affected by the more abstract debates over the inheritance issue. Receiving little guidance from institutional and political leaders who are themselves in more of a quandary over the inheritance problem than they are wont to admit, the courts tend to go their own way, more or less taking their cues from those who use them.

CHAPTER SEVEN

The Political Roots of Islamic Legal Conservatism in Indonesia

STUDIES OF POLITICAL DEVELOPMENT AND MODERNIZATION in new states have paid some attention to secularism and law. Not much research has actually focused on these problems. Little research has been done on religion in new states, and even less has been done on law. Rather, because of the influence of Western models of political and social evolution, it has simply been taken for granted that secularization and the emergence of rational-legal orders are natural parts of any modernizing pattern.[1] As long as the countries of Europe and North America are considered proper standards of modernity, it is hard to escape this kind of simplistic transference of attributes. There is probably no need to challenge again the analogistic thinking behind such assumptions, nor to bore anyone with a summary of difficulties

[1] See, for example, Lucian Pye, *Aspects of Political Development* (Boston: Little, Brown, 1966), pp. 6–9 and 113ff. One of the more sophisticated and useful attempts to examine the place of law in new states is by Marc Galanter, "The Modernization of Law," in Myron Weiner, ed., *Modernization* (New York: Basic Books, 1966), pp. 153–166.

with the concepts of political development and modernization.[2] It is enough to say that historical patterns of social change in the West do not exhaust the possibilities.

Even if they did, however, we would know little more about their actuality than we do now. Apparent social patterns produce various outcomes in differently arranged societies. Whether unique cases really exist depends upon our level of abstraction. But it is clear enough that remarkable differences between social solutions in various countries have to be explained before we proclaim the discovery of a grand historical trend, which, all the more so because the trend is basically in the future, explains almost nothing. Such "trends" are really conceptual blinders; they inhibit rather than provoke research. Especially in new states, where lack of data encourages higher levels of abstraction, the danger is that the obvious will be subtly turned into the unreality of a superimposed general pattern. For social science research in some fields, this sort of comment is already old hat, careful studies having shown alleged patterns to be so riddled by evident exceptions that it is no longer helpful to rely upon them as patterns.[3]

In other fields, law being an outstanding example, the warning remains valid. I do not mean to argue that a search for general patterns is silly or unnecessary. As an analytical proposition the assertion that a pattern exists obviously sets the stage for testing it. In a sense, that is what this study of Islamic courts in Indonesia is about. What I am arguing for, however, is a much lower level of abstraction, accompanied by problem-focused research, in which evident deviations receive as much attention and healthy respect as apparent patterns. Studies of law in society are particularly vulnerable to less open approaches because of the narrow definitions and concepts which still encumber social science work on law, let alone legal work on law.

At closer examination, then, trends toward European-like legal systems, as well as toward secular political systems, may turn out to be very fuzzy and uncertain, appearances notwithstanding. Secularism and rational-legal norms inhere in the state

[2] See J. P. Nettl, "Strategies in the Study of Political Development," in Colin Leys, ed., *Politics and Change in Developing Countries* (Cambridge: University Press, 1969), pp. 13–35.

[3] See Aristide R. Zolberg, *Creating Political Order: The Party States of West Africa* (Chicago: Rand McNally, 1966).

forms, structures, and symbols inherited from colonial history and European influence, but they do not necessarily inhere in existing political cultures. What appears to be a growing secularization of politics may in fact contain a struggle between contending sectarian world-views, in which the outcome at any point in time is a mixture of civil and religious concepts and wishes. Similarly, emphases on legal symbols often mask a decline in the efficacy of inherited bureaucracies and a reassertion of patrimonial authority. None of this denies that secular ideals and norms of legality may become defining characteristics of societies in which they are not now obvious attributes. Whether they do or not is an empirical question, if we ever can agree on what secularism and legality usefully mean. But secularism and legality are not imperative attributes of "modern" societies, nor by themselves do such concepts say much about the quality of collective and personal life. Their presence or absence is determined by a wide variety of political, economic, and cultural factors, combined variously to produce more or less distinct social outcomes. The outcomes may vary from one time period to another, changing fundamentally as, for example, the balance of political forces changes, as economic systems are transformed, as class structures regroup, and as institutional forms break down and develop anew.[4] Ideological and institutional outcomes, in this case the mix of attributes that favors (or doesn't favor) secular ideals and legal norms, cannot really be anticipated with any precision before the social forces in control are reasonably clear.[5] Nor is it very helpful to try to predict without such knowledge, because personal value preferences are then likely to influence one's predictions. Besides, it is difficult enough to understand what is going on now, in new states and old ones, without making predictions for all time.

In this study of the evolution of Islamic courts in post-

[4] In connection with this argument, two studies seem to me to be appropriate models of the kinds of research that might be done in law-related areas. One is Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1957), a study of the political and social consequences of the development of the market system. The other, which is in fact a legal study, is Karl Renner, *The Institutions of Private Law and Their Social Functions* (London: Routledge & Kegan Paul, 1949).

[5] This is one lesson to be drawn from Barrington Moore, Jr., *The Social Origins of Dictatorship and Democracy* (Boston: Beacon Press, 1967).

revolutionary Indonesia, our primary concern has been to understand the bases of a distinct mix of institutions in a socially, culturally, and politically complex state. The mix is different from that in most other Islamic countries. Why this should be so cannot be determined from an analysis of Islamic doctrine and institutions alone. Islam is not everywhere the same, but everywhere it has made similar claims to govern a portion of the lives of Muslims, claims increasingly contested by national governments no longer fully inspired by Islamic ideals. Differences in institutional outcome from such struggles have to be examined in the wider context of conflict over the exercise of legitimate authority with respect to nearly all aspects of social life. As the terms and conditions of such conflict vary, so do the results.

In comparison with other Islamic countries, Indonesia stands out for both the staying power and the conservatism of its Islamic doctrine and institutional practice. In Indonesia Islamic legal institutions have expanded along with civil institutions, while elsewhere they have tended to stand still, contract, or even disappear before the expanding authority of civil government. In addition, and probably related to the capacity of Islamic administration to survive, Islamic ideological change in Indonesia has been relatively slow. Islamic modernism in Indonesia has been doctrinally less inventive and outspoken than elsewhere, and also ultimately less influential on Islamic administrative practice. In this concluding chapter I want to examine the conservative bias of Islamic legal development in Indonesia in the light of patterns of political conflict.

The arguments of Islamic modernism, beginning with such thinkers as Muhammad 'Abduh, Rashīd Rīda, and al-Afghani, have been essentially the same everywhere, though they have been carried further in some Islamic countries than others.[6] With respect to legal theory the modernist thrust has been that *taqlid*, "imitation" or submission to doctrines established by the seminal juristic thinkers of early Islam, is no longer acceptable. Reacting against European pressure on Islamic countries, and conceiving the need to modernize in defense of Islam, modernist intellectuals attempted to lay a basis for change that would not at

[6] Malcolm H. Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad 'Abduh and Rashīd Rīda* (Berkeley and Los Angeles: University of California Press, 1966).

the same time challenge the essential foundations of Islam. For religious law, this meant that the possibility of creative innovation through novel interpretation of original sources—*ijtihad*—must be recognized again and encouraged. The post-Koranic doctrinal accretions that have given Islamic law its rigidity must be swept away, along with the peculiar authority of the ulamas that derives from a monopolistic right to apply ancient legal rules. In effect, according to modernist thinkers, the Koran and the example of the Prophet are sufficient sources, and in them Islamic leaders may find all the necessary guidance for dealing with the problems of new ages. Modernist legal ideas by no means imply a rejection of Islamic law. Rather they demand a flexible renovation of it, and a recognition of the necessity of legal change, but the law remains rooted in Islamic belief and religious authority.

Geertz has discussed the social and ideological shortcomings of the modernist (or scripturalist, as he aptly calls it) movement, as Kerr has dealt with the doctrinal limitations.[7] Islamic modernism, Geertz argues, never quite caught up with the proliferating demands of changing societies in search of new and more adequate explanations of the world and new institutional capabilities of dealing with essentially old but now differently perceived problems. The efforts of modernist spokesmen, old and young, to find some rationale for democracy, socialism, and so on, in the words of the Prophet, are strained and limiting. In the case of law, particularly personal law, there is hardly any need for a search. It is there in the Koran, much of it, and it is sacred. By modernist arguments, religious law may be rearranged and reinterpreted, and rules may be chosen more flexibly than in the long past, but the essential sources and purpose of it remain profoundly Islamic. The law is much more than a set of rules. In Islam, as in orthodox Judaism, religious law represents ideally the ethical foundation of community. To suggest that Islamic law altogether is out of date, that it is no longer suitable to modern purposes, that reinterpretation and a careful selection of rules from all Sunni *madhab* may not be enough to fulfill those purposes, is to threaten one of the oldest and stoutest pillars of the faith. Here, on the surface, traditionalists and modernists

[7] Ibid., and C. Geertz, *Islam Observed* (New Haven and London: Yale University Press, 1968).

differ mainly on the sources of religious law. But for many devout Muslims, traditionalist and modernist alike, Islam without the law is unimaginable.

Those for whom it is imaginable are essentially postmodernists, though coming out of a modernist tradition, who are seeking (or encouraging a search for) precisely the new religious meanings that Islam, perhaps even more than other major world religions, has failed to produce. One such is the Indian Islamic scholar A. A. Fyzee, who has called for a renovation of the faith that would set the law aside, abjuring political goals in favor of a more intense concern with religious ethics and personal values in a confused and shaky world.[8] This seems to be a logical next step beyond modernism—which is, of course, no guarantee at all that it will be taken by most modernists. Islamic modernism has no doctrinal sympathy with political secularism. Yet in some Islamic countries modernists and secularists occasionally have come together on the need for specific family-law reforms.[9] That they might do so is not surprising. Modernism found support among the same urban, commercial, and professional classes that also produced nationalist leaders who ultimately espoused principles of civil government and secular politics. And finally it was these nationalist leaders, themselves likely influenced by modernist arguments against Islamic traditionalism, who stepped beyond modernism and, in the eyes of some modernists, beyond Islam.

[8] A. A. Fyzee, "The Reinterpretation of Islam," *University of Malaya Law Review* 1, no. 1 (July 1959): 39–58. In his forthright argument, Fyzee separates revelation from human endeavor, and the latter is attributed to *fiqh*, legal rules, which must be changeable. He admits that the line between Sjariah, as man's obligations to God, and *fiqh* is often ignored. The distinction is essential to legal reformers, for otherwise all the legal rules become sacrosanct as the words of God. Pointing out that everywhere in the Muslim world the modern state and its law are constricting the application of Islamic law, Fyzee argues that the final step must now be taken for the separation of old legal rules away from the moral and religious teachings of Islam upon which religious leaders must concentrate, as happened in Judaism. Fyzee looks to Turkey as the progressive model of Islamic society. The religion, he says, if it is to survive meaningfully, must be freed from the shackles of its own civil law. Fyzee's views are not well known in Indonesia, nor would they be popular, but among some Indonesian modernists, particularly a few political leaders, similar, less well formed, arguments can be heard.

[9] H. A. R. Gibb, *Modern Trends in Islam* (Chicago: University of Chicago Press, 1947) pp. 89ff.

In *Modern Trends in Islam*, H. A. R. Gibb argued some years ago that modernist strength in the Middle East should not be exaggerated, that Islamic conservatism was dominant everywhere in the region outside of Egypt.[10] Nor did Middle Eastern modernist intellectuals really go far beyond the original arguments of Muhammad 'Abduh and Rashīd Rīda themselves in the late 1800s and early 1900s. For a number of reasons, it was in India that modernism sped on intellectually, ultimately producing Islamic figures with Fyzee's perspective on imperatives of religious change.[11] Still, in the Middle Eastern and North African countries, as well as in India and Pakistan, the modernist impetus has in fact borne fruit, though probably more and stranger fruit than Muslim reformists wanted or expected.

In most of these countries religious law and judicial institutions have passed into one or the other of two stages of change. In one, Islamic courts are abolished altogether and civil courts take over the function of applying certain rules of Islamic family law in appropriate cases. In the other, Islamic courts remain but are increasingly restricted and brought under the law-giving authority of civil institutions. Where the latter settlement has been established, religious law has undergone considerable emendation by national legislative authorities; at the least, religious courts have been compelled to rely upon a wider and consequently more supple Islamic doctrinal base—that is, all the Sunni *madhab* rather than one. Both arrangements have broken through the weight of Islamic doctrinal and institutional tradition to force or induce change. One need only cite, by way of example, the statutes on personal law and status in Syria, Egypt, Tunisia, and Morocco, the Muslim Family Laws Ordinance of 1961 in Pakistan, and the elimination of Sjariah courts in Egypt and Tunisia in the mid-1950s.[12] Kemal Atatürk's decision to implement a wholesale secular-law reform in Turkey represents an obviously more radical approach yet. Such reforms were opposed by Islamic traditionalists and modernists, and no doubt still are to a considerable extent, but the battle is lost. The implementation of the reforms is by no means complete, nor in the

[10] Ibid., p. 54. [11] Ibid., pp. 56–57.

[12] N. J. Coulson, *A History of Islamic Law* (Edinburgh: University Press, 1964), pp. 149ff, and Kemal A. Faruki, "Islamic Family Law in Pakistan in the Context of Modern Reformist Movements in the World of Islam," *Islamic Review*, May 1965, pp. 5–8, and June 1965, pp. 8–12, 17.

first place did they go as far as some national legal reformers wanted. Compromises were necessarily made with Islamic sensitivities. Moreover, the new laws in any event must be adapted to popular religious values, and are adapted whether civil political and administrative elites like it or not.

Symbolically, however, these reforms are enormously significant. Whatever compromises have been made, however much Islamic law influences new personal law, the reforms betoken a surrender of authority by traditional ulamas and religious jurists over the last and most critical stronghold of the Sjariah, family law. Justification for imposing change could everywhere be found in the traditional doctrine of *siyasa*, the authority of government to act administratively in the public interest, also with respect to the form and procedure of Islamic judicial institutions, as long as substantive law remained unaffected. Early reforms in the late nineteenth and early twentieth centuries were worked out precisely by redefining procedures and jurisdiction of Islamic courts. In most recent reforms, however, the *siyasa* rationale has worn thin. For there has in fact been a shift of authority from Islamic bureaucracies to the state, where secular models of society have had a growing influence on all legal institutions. Islamic legal traditions have not disappeared or been discarded. New substantive law may be, undoubtedly will be, profoundly influenced by Islamic conceptions of family, marriage, inheritance, and so on, varying with inherent differences between Islamic societies. But the source of new law in many Islamic countries has changed. The authority behind law—what indeed makes it possible to legitimately create new law in realms once controlled by Islamic institutions—rather than ancient religious doctrine, has become the state imperium itself. Such a shift in authority over all law, over all kinds of human behavior, so to speak, portends institutional change as well, as has already occurred in Egypt and Tunisia. And in turn institutional change probably indicates further substantive-law evolution; as the Indian experience has shown in the emergence of a distinct variety of Anglo-Muhammedan law, substantive law is formed by the institutions responsible for applying it. Wherever such transformations have occurred, Islam has been forced, however reluctantly and with whatever future hopes, to relinquish traditional authority over its adherents' lives. The next step beyond modernism is being imposed upon Islamic politics, and more

slowly perhaps upon Islamic political thought, by the rapid rise to power of governing elites no longer bound by essentially Islamic commitments.

By contrast, the Indonesian case seems curiously the same yet wholly different. Indonesia's governing elite is by no means Islamically inspired, but it has not been able to establish its authority over areas of life controlled by Islamic institutions. Instead of a rapid or gradual decline, Islamic legal institutions have in some ways grown stronger. Although in the long run it appears that civil bureaucratic institutions are likely to win out over the Islamic bureaucracy, for the foreseeable future religious courts and offices seem to be able to hold their own.

The present place of Islamic courts and law in Indonesia helps to illustrate essential differences from other Islamic countries. Structurally the courts have probably now settled upon a plateau of change, corresponding more or less to the level and conditions of Islamic political power in the state. While the Indonesian Islamic judiciary, unlike the situation in most other Islamic countries, has achieved and consolidated a considerable though obviously limited degree of institutional autonomy from civil institutions, this autonomy is double-edged. Among Indonesian judicial institutions, Islamic courts are distinctly subordinate, in almost the same way that Islamic political strength is basically subordinate to the combined political strength that has controlled Indonesia since 1945. Compared with the colonial period, there is less interest in religious courts outside of the Islamic community and the Ministry of Religion.[13] Autonomy in one perspective is isolation in another. The drawbacks of such autonomy are the more serious because the relative independence of Islamic courts from civil institutions is partially inspired by Islamic status anxieties and fear of absorption, reinforced by the disinterest, disdain, and hostility of civil bureaucrats and law leaders. Unless a major political power shift occurs in favor of Islam (an unlikely development), then, the Islamic judiciary has reached its institutional power limits. A similar shift in favor of

[13] For example, while the colonial *Tijdschrift van het Recht* undertook to report decisions of the newly formed Mahkamah Islam Tinggi, this has not been true of the *Madjalah Hukum dan Masjarakat*, the major jurisprudential journal of Indonesia. Articles on Islamic law and legal institutions are rarely published in journals and magazines other than Islamic ones.

non-Islamic political power would probably be reflected in a gradual erosion of Islamic bureaucratic authority. Until the early 1970s the balance has been roughly stable. But balance, it should be emphasized, has not meant equivalence. Islamic groups have been strong enough to prevent Islam from being ignored, but not strong enough to control the government.[14] The effects on this balance of the election of 1971, in which Islamic electoral strength was drastically reduced, will be discussed later in this chapter.

Substantive Islamic family law in Indonesia is also autonomous or isolated, so to speak. The authority for its application is firmly linked to religious courts and local religious offices. Civil courts are not bound by it, except insofar as judges remain influenced by old adat law theory which recognizes the possible reception of Islamic rules. As civil courts move away from a passive toward a more active conception of a judicial role in the

[14] Factors in this balance include the army, political parties, labor unions, peasant groups, student and youth groups, and related organizations. Several labor and peasant organizations, all quite weak since 1965, are associated with political parties, but some are under control of the army. The same is true of student and youth groups, a few of which, however, are independent. The political parties, since 1965, include four Islamic organizations: Nahdatul Ulama, Partai Muslimin Indonesia, the Partai Sarekat Islam Indonesia (PSII), and PERTI, the last two much smaller than the first two; the Nationalist Party (PNI); the Ikatan Pendukung Kemerdekaan Indonesia (IPKI: League of Supporters of Indonesian Independence), originally an army-based party, now less distinctly so; the minor nationalist group, Murba; two Christian parties, the Partai Katolik and the Partai Keristen (Protestants). On Islamic ideological issues, the Islamic parties stand alone with their associated labor, peasant, student, youth, and intellectual groups. The other parties and their subsidiary organizations tend to join forces with the army. On other political and economic issues, the coalitions change considerably. For background on Indonesian political forces, see Herbert Feith, *The Decline of Constitutional Democracy in Indonesia* (Ithaca: Cornell University Press, 1962) and his *The Indonesian Elections of 1955* (Ithaca: Cornell Modern Indonesia Project Interim Report series, 1957); Donald Hindley, *The Communist Party of Indonesia: 1951–1963* (Berkeley and Los Angeles: University of California Press, 1964); Daniel S. Lev, Political Parties in Indonesia," *Journal of Southeast Asian History*, Special Issue, August 1967; Herbert Feith, "Suharto's Search for a Political Format," *Australia's Neighbors* (May–June 1968); Roger Paget, "The Military in Politics in Indonesia: The Burden of Power," *Pacific Affairs* 40 nos. 3–4 (Fall 1967–1968); Allan Samson, "Islam in Indonesian Politics," *Asian Survey* 8 no. 13 (Dec. 1968); and K. E. Ward, *The Foundation of the Partai Muslimin Indonesia* (Ithaca: Cornell Modern Indonesia Project Interim Report series, 1970).

creation of law, even this limited influence of Islamic legal rules is declining. Moreover, adat law theory has always refused to recognize the Islamic authority of received Islamic rules.

Legislative action has also done little by way of interfering with, or being influenced by, Islamic law. In and out of Parliament the Islamic parties' basic posture has been a negative one of preventing law reforms, particularly with respect to the marriage-law regime, that in any way threaten Islamic doctrine. Traditionalists and modernists alike have publicly agreed in their opposition to any such legal reforms. Unlike their counterparts in other Islamic countries, Indonesian modernists have not cooperated with non-Islamically oriented groups in support of family-law reforms, even when they have privately agreed fundamentally with the purpose of the reforms. Rather they have been more inclined to work within Islam on such efforts as marriage-reconciliation boards. The Islamic position on reform issues has been not merely that religious legal principles are too dear to admit of fundamental renovation, but also that the state must not be permitted to interfere in affairs of the Ummat Islam. Whatever reforms may occur, then, have to be worked out within the Islamic community itself.[15] Once again, political balances are such that Islam cannot win a great deal more for Islamic law and institutions, but neither can non-Islamically based political forces compel political Islam to retreat very much from its defense of religious legal territory already won. Furthermore, this Islamic legal territory is dominated by traditionalist-inclined forces to an extent that permits remarkably little influence by modernist thought in comparison with other Islamic countries. Functional legal adaptation and change occurs within the reli-

[15] Delicate political balances within Islam also make reforms very difficult to achieve. For example, there have been attempts made from within the Ministry of Religion to bring some order to the collection and distribution of the *zakat* religious taxes and contributions. The intent was to organize the collections better and to make certain that the income was put to use for social purposes, particularly in Javanese villages. When a Ministry of Religion conference considered the question in 1964, considerable opposition arose to any proposals of change, primarily from village ulamas and other religious officials responsible for collecting the *zakat*. The basic reason seems to be that these officials take a percentage, often a large one, from the *zakat* contributions. The same men, however, are politically important to the Nahdatul Ulama. Evidently the issue was dropped. My meager information on the conference proceedings came from participants.

gious judiciary itself, but no doctrinal base has developed to encourage institutional flexibility to meet and deal with pressures of social change.

Why has Indonesia not followed the course of change evident in other Islamic countries in the twentieth century? What factors have enabled conservative Islamic groups to maintain their grip on the law? Some observers, Indonesian and foreign alike, have been tempted to dismiss the Indonesian case as a mere backwater deviation, which hardly explains very much. C. C. Berg was probably right in suggesting, forty-odd years ago, that Indonesian conditions did not ripen for Islamic modernism as early as in other countries, and the modernist movement consequently failed to mount a consistent intellectual drive against traditionalism.[16] The implications of this reasoning are important, and they might help to explain why modernist arguments did not make more inroads on traditionalist thought than they did and why modernist thought itself remained relatively conservative in Indonesia. But this is not enough. The analysis that will be followed here, with respect to problems of Islamic legal development in Indonesia, concentrates partly on colonial influences but more importantly on characteristics of political structure and ideological conflict that have determined how the Islamic struggle would be carried on.

[16] Berg pointed out that Islamic modernism seemed to be much less important in Indonesia than in India or Egypt, "as a consequence of the fact that the causes out of which modernism developed over there only began to work in Indonesia at the time of its spread. The first appearance of Moslem modernism in Sumatra and Java was premature in a way, and therefore lost itself in trifles, instead of consistently following the main line of development. In the course of the last twenty years, however, the influence of European education has materially changed the general cultural condition of Indonesia, and as a result Moslem modernism is 'modernizing' nowadays and growing less naive" C. C. Berg, "Indonesia," in H. A. R. Gibb, ed., *Whither Islam* (London, 1932), p. 270. But the "modernization" of modernism appears to be taking place very slowly. It is true that younger generation Muslim modernists, from the universities especially, are taking a more change-oriented position with respect to both traditionalism and modernism, a position that tends to reduce the importance of religious law considerably. But these younger men are limited in what they can do politically within Islam, and they are confronted by many of the same political imperatives as their predecessors. The result is that while thought may be changing, action remains not much different from before. Included in such action is a lack of public debate over Islamic issues within the Islamic community itself.

Part of an explanation for the relative conservatism of Islamic legal evolution in Indonesia lies in colonial history. In British and French colonies change was forced (sometimes unwittingly) upon Islamic institutions with what Dutch colonial policy makers considered remarkable abandon. India is one example and North Africa another in which colonial legislators and courts did not hesitate to deal with Islamic law and to read quite foreign concepts into it. In Malaysia, too, colonial authorities were not overly reluctant to legislate in family-law areas ruled by religious law. Consequently a tradition of legislative action in fields nominally dominated by Islamic law remains in these countries, a tradition that has to be used carefully but can foster change. Although Dutch intrusions upon Islamic institutions were greater than colonial ideology would admit, yet the approach to Islam tended to be delicate, if not respectful, and little was done to encourage change from within Islam itself.[17] Snouck's charge that the education of Indonesian Islamic leaders was hopelessly neglected by colonial administration is pertinent here. But in the law itself, moreover, the colonial government had far greater influence on adat law than on Islamic law; colonial courts seldom ruled on Islamic legal matters. And as for legislation, the Dutch might change the competence of Islamic courts, but there were few attempts to treat substantive rules (a bill on marriage in the late 1930s failed because of Islamic opposition). So independent Indonesia inherited no history of state action with respect to Islamic substantive law. In a sense, the posture toward Islam of national governing groups in independent Indonesia is rather like that of colonial authority: unreceptive, but diplomatic and careful.

Even colonial policy concerning Islamic subjects, however, has to be understood in the context of Indonesian political structure. Unlike India, where the Muslim community was clearly identifiable over against a Hindu majority, in Indonesia the line between essentially Muslim and essentially non-Muslim has always been blurry and shifting, something over 90 percent of the population being at least nominally Islamic. For our purposes, the political condition of Islam can be understand as depending upon the relationships of two social-religious-political axes. One

[17] See G. W. J. Drewes, "Indonesia, Mysticism and Activism," in G. E. von Grunebaum, ed., *Unity and Variety in Muslim Civilization* (Chicago: University of Chicago Press, 1955), esp. pp. 296–297.

is formed of the opposition between traditionalist and modernist Islam, really a continuum. The other, also a continuum but with heavier poles, consists of the antagonism between Islam on the one hand and nominally Islamic but often anti-Islamic or non-Islamically oriented forces on the other.

Along the first axis, in the twentieth century the cleavage between Islamic traditionalism and modernism was given an organizational format with national political implications, first in the form of social and educational groups and then as full-blown political parties competing for national political power.[18] The followings were and are defined partly by social and economic attributes. Traditionalist inclinations tended to be strongest among Javanese Islamic landowners and bureaucratic families. Modernism understandably drew support from emerging coastal, urban, entrepreneurial groups. Although modernist thought did influence and continues to influence more conservative views, yet the major political organizations—Masjumi and Nahdatul Ulama in the independent state—by consolidating a divisive organizational structure, limited the interplay and interchange

[18] The modernist educational and social foundation Muhammadijah was established in 1912 and grew rapidly thereafter. The conservative response came in 1926 with the creation of the Nahdatul Ulama. There were (and are) other Islamic groups distributed along a continuum of traditionalism to modernism. On the fundamentalist-modernist organization, Persatuan Islam (Islamic Unity), see Howard M. Federspiel, *Persatuan Islam: Islamic Reform in Twentieth Century Indonesia* (Ithaca: Cornell Modern Indonesia Project Monograph, 1970). Many of these groups, including Muhammadijah and the NU, merged in Masjumi, established with the help of the Japanese military administration. Masjumi was reconstituted early in the revolution, but its constituent parts soon began to pull apart. The Partai Sarekat Islam Indonesia withdrew during the revolution, and NU left in 1952. Muhammadijah's influence in Masjumi's leadership was an important cause of the NU's withdrawal. Muhammadijah remains active, having organizationally distanced itself from the party in order to avoid the party's fate. Masjumi was banned in 1960, on grounds that some of its leaders and members had participated in the regional rebellion of 1958–1961. Following the destruction of the Communist party in 1965–1966 and the downfall of Soekarno during the same period after the attempted coup of 1965, the old Masjumi group was resuscitated as the Partai Muslimin Indonesia. The latter, however, has suffered from the unwillingness of the army leadership to permit former Masjumi leaders to assume formal authority in the new party. Yet these leaders, particularly Mohammad Natsir, Prawoto Mangkusasmito, Mohammad Roem, and others, remain dominant figures in the organization. See Samson, "Islam in Indonesian Politics," and Ward, *The Foundation of the Partai Muslimin Indonesia.*

of their clienteles' ideas. The struggle for control of influential constituencies, as was indicated earlier, left the bureaucracy with NU, and most urban Islamic intellectuals and professionals with Masjumi (or, now, the Partai Muslimin Indonesia, Parmusi). Similar conditions of cleavage have obtained in other Islamic countries as well. But while elsewhere modernist groups often proved better able to organize, if not to dominate Islamic politics, and to link up with emerging secular-nationalist groups, in Indonesia it has been the traditionalist party, Nahdatul Ulama, that has gained the upper hand in an uneasy alliance with dominant governing groups. In part this was determined by the fact that the Nahdatul Ulama, a basically Javanese party, fits more easily into the Javanese-related power structure that dominates Indonesian politics than does Masjumi-Parmusi, whose representation of non-Javanese interests has tended to exclude it from a comfortable sharing of power. More is involved, however, and this will be taken up again shortly. In any event, one consequence of the NU's ascendance has been that modernist or reformist ideas have not flowed easily from one side of the Islamic political spectrum to the other. Gradually an urban and professional stream of leaders has developed influence within the NU, increasingly in fact since the 1960s, and has begun to challenge the East Javanese rural Islamic *kijai* domination of the party. But a condition of this challenge is that ideological issues not be raised or articulated very loudly. Nor are many of the new-style NU leaders apparently deeply interested in such issues. As yet, then, the intellectual basis for considering problems of change within Islamic tradition remains rather much the same as it has been.

Indonesian Islamic modernists have been progressive in their own environment, but decidedly slow in catching up with modernist legal thought elsewhere.[19] They have plied two general routes in their reform proposals, both of which are quite common in the rest of the Islamic world. Some, the outstanding examples being Professors Notosusanto and Ash-Shiddieqy, have argued

[19] There are variations in modernist legal views—for example, whether the Koran alone or the Koran and Sunnah, traditions of the Prophet, should be considered essential legal sources—but they will be paid no attention here, for they are not critical to our discussion. See Federspiel, *Persatuan Islam*, for a treatment of such differences, along with a discussion of Indonesian modernist thought generally.

that Indonesian Islam, instead of relying exclusively upon Sjafi'i law, should pick and choose flexibly among the four Sumni *madhab*.[20] J. N. D. Anderson and N. J. Coulson have noted how effectively this approach has been used for legal innovation in Middle Eastern countries.[21] It has the advantage of not rejecting *taqlid* altogether nor of raising the traditionally scorned spectre of *ijtihad*. Yet Indonesian Islamic administrators and judges still will have none of it. The second line of argument, raised in Indonesia most spectacularly by Professor Hazairin, is more radical in that it does insist frankly on exercising *ijtihad* in order to develop a distinctly Indonesian *madhab*.[22] This view has had

[20] Notosusanto, *Organisasi dan Jurisprudensi Peradilan Agama di Indonesia* (Jogjakarta: Jajasan Badan Penerbit Gadjah Mada, 1963); Prof. Tengku Muhammad Hasbi Ash-Shiddieqy, of the I.A.I.N. in Jogjakarta, *Sjari'at Islam Mendjawab Tantangan Zaman* [The Islamic Sjariah responds to the challenges of the age] (Jogjakarta: Penerbit I.A.I.N., 1381/1961); and *Hukum Islam* [Islamic law] (Djakarta: Pustaka Islam, 1962). Actually, Ash-Shiddieqy has gone far beyond the argument that all four *madhab* should be used—called *takhayyur*—to agree emphatically with Prof. Hazairin on the need for a new *ijtihad*. See *Sjari'at Islam Mendjawab Tantangan Zaman*, pp. 40–41. Like other modernist legal scholars elsewhere, Ash-Shiddieqy separates the *fiqh*, the legal rules concerned with human relations, from the broader Sjariah, which includes both the *fiqh* and rules of *ibadah*, obligations to God including prayer, pilgrimage, charity, fast, and so on. The *ibadah*, he and others argue, is not subject to change by *ijtihad*.

[21] J. N. D. Anderson, *Islamic Law in the Modern World* (New York: New York University Press, 1959), p. 91; Coulson, *History of Islamic Law*, pp. 182ff. Even Saudi Arabia, one of the few Islamic countries where Islamic law is supposed to be dominant, has resorted to selection from various *madhab*.

[22] In his *Hukum Kewarisan Bilateral menurut Qur'an dan Hadith* [Bilateral inheritance law according to the Koran and Hadith] (Djakarta: Tintimas, 1964), Hazairin calls the effort a new *ijtihad*. See also his *Hukum Baru di Indonesia* [New law in Indonesia] (Djakarta: Bulan Bintang, 1961), *Hukum Kekeluargaan Nasional* [National family law] (Djakarta: Tintamas, 1962), *Hendak Kemana Hukum Islam* [Whither the Islamic law?] (Djakarta: Tintamas, 1960), *Indonesia: Satu Masdjid* [Indonesia: one mosque] (Djakarta: Bulan Bintang, 1952), *Hukum Islam dan Masjarakat* [Islamic law and society] (Djakarta: Bulan Bintang, 1960). Hazairin has had a certain amount of influence on other Islamic scholars, primarily of course on his students. See, for example, the dissertation by Anwar Harjono, a former Masjumi leader, *Hukum Islam: Keluasan dan Keadilaanja* [The Islamic law: its breadth and justice] (Djakarta: Bulan Bintang, 1968). See also the address by Hadji Aboebakar Atjeh on the occasion of his honorary doctor's degree at the Islamic University of Djakarta, under the sponsorship of Hazairin, *Islam: Sumber Djihad dan Idjtihad* [Islam: the source of Holy war and *idjtihad*] (Djakarta: Islamic University of Djakarta, 1967).

even less influence on the Islamic bureaucracy and traditionalist political leaders.

A mere handful of Islamic scholars has represented these arguments on behalf of legal modernism. The arguments themselves, though current and influential west of Indonesia since early in the century, have hardly caught fire yet in Indonesia. At most, in one sense, Indonesian modernist scholars are still trying to forge a clear link between Islamic law and nationalism. Hazairin moves most obviously in this direction when he proposes an Indonesian *madhab*. Notosusanto and similar thinkers are less explicit, but when they suggest a judicious selection of rules from all existing *madhab*, what are they saying if not that on a symbolically Islamic base the personal law of Indonesia must be peculiarly fitted to Indonesians; and Indonesians shall do the selecting. It is significant that some, not all, of the Islamic scholars who have sought reform are also well-versed in European law. They are fully aware of the accommodations Islam has already made to Indonesian social environments.

The response of traditionalist Indonesian Islam to such views has occasionally been to try to read them out of the Islamic consensus altogether. The bitterness of doctrinal differences within Indonesian Islam is often overlooked, because these differences have been submerged within other issues of politics and because national Islamic leaders do not dwell on them much. Indeed, the political interests of national Islamic leadership groups are so often unrelated to doctrinal differences that many observers suppose doctrinal issues are merely a cover-up for more opportunistic purposes. It is a cynical but realistic judgment. Yet at lower party levels and in bureaucratic and intellectual circles, doctrinal conflict has in fact often been hard and angry, as much now as when the Nahdatul Ulama emerged to hold the conservative fort against the modernist Muhammadijah.[23]

[23] In 1963, for example, a letter to the editor of the modernist magazine, *Gema Islam*, raised the problem of antimodernism again: "Always the words 'Mazhab Ahlus-sunnah wal djama'ah' [the original four Sunni doctrines: Maliki, Hanafi, Sjafi'i, Hanbali] are used where I live . . . in the battle for influence. Those who can give popular Islamic leadership to the masses are intimidated by those who call themselves the Ahlus-sunnah wal djama'ah. They say that even though those leaders can talk smartly, their words should not be followed, because they have left the Mazhab Ahlus-sunnah wal djama'ah. A great writer who has written books about Islam which can be understood generally, both by intellectuals as well as by ordinary Muslims, is forbidden [by

On the modernist side of Indonesia's Islamic party world, modernist legal ideas have been more or less accepted without being developed or even paid much attention. Modernist political spokesmen have had essentially very little to say about issues of religious law since the 1930s. The burden of exposition has therefore fallen almost entirely upon a few scholars, whose writings have not been sufficient to provoke anything approaching a national debate.[24] Nor are the scholars influential in the

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those who call themselves Ahlus-sunnah wal djama'ah] because—they say—he no longer follows the Mazhab Ahlus-sunnah wal djama'ah. It is not rare for conflict and division to occur here because of this attitude of monopolizing the Sunnah wal djama'ah. Recently even the Department of Religion has formed an institute for the examination and selection [or planning] of volumes of religious scholarship, so that there will be no religious books in conflict with the Mazhab Ahlus-sunnah wal djama'ah. . . . There are also those who say that [modernist] organizations like Muhammadijah, Al-Irsjad, and Persis no longer are included among the Ahlus-sunnah wal djama'ah. . . . [If the Department of Religion's effort is serious] the writings of A. Hassan Bandung, Dr. Hamka, Prof. Hasbi Ash-Shiddiqie, or the late Munawar Chalil will no longer be permitted to circulate because they are from Muhammadijah, or Al-Irsjad, or Persis." The reply was couched in typically modernist terms of change, justified by reference back to the Prophet as well as to freedom of thought. Not long afterward a similar letter was received from Atjeh, and there is little doubt that such attacks on modernism frequently occurred elsewhere in the country. See *Gema Islam* 2, nos. 36–37 (August 1, 1963): 26–27; and *Gema Islam* 2, no. 41 (Oct. 1, 1963): 28–29. See also the forceful modernist argument against the rigid adherence to Sjafi'i doctrines and *taqlid* by Hamka, "Masaalah Chilafijan dan tentang Taqlid dan Idjtihad" [The chilafijan problem and concerning taqlid and idjtihad] in four parts, *Gema Islam* 2, no. 42 (Oct. 15, 1963): 9–11; no. 43 (Nov. 1, 1963): 8–10, in which Hamka discusses the conservatism of the Islamic bureaucracy; no. 44 (Nov. 15, 1963): 6–7; and no. 45 (Jan. 1, 1964): 11–13. The interest of some officials in the Ministry of Religion in proscribing modernist books, inspired anew partly by the evident political ascendancy within Islam of the NU during the period of Guided Democracy, never really got far. It did not have much support to begin with, even in NU circles. Modernist writers like Hamka were in the habit, during the years of Guided Democracy, of noting President Soekarno's early preference for Indonesian modernists against Islamic conservatism. This formed a kind of defense against antimodernist attacks. See the article by Hamka cited above. In connection with the *Gema Islam* letter, the doctrines of Shi'ah Islam, *inter alia*, are excluded from the Mazhab Ahlus-sunnah wal djama'ah. Hazairin and a few others, however, have also referred to Shi'ah legal ideas.

[24] Occasionally, however, intellectual confrontations have set off brief flurries of excitement and exchange over issues of Islamic and national civil law. At a conference of the Indonesian Lawyers Association (Persahi) in 1963, the discussion by Hazairin and others, particularly the

formation of party ideology and policy. In the daily press, where one seldom sees news of Islamic administrative or judicial activities, discussion of the broader problems of Islamic law are usually confined to special columns set aside for religion in the Friday editions. Even then issues are infrequently joined. And when Islam has been most in the light of public debate, during the 1955 elections or in the Constituent Assembly (1956–1959) discussions of ideology, or in debates among youth groups following the attempted coup of 1965, Islamic institutions have generally been ignored, their problems of development and change set aside in favor of grander but fuzzier issues of ideology and lesser but more pressing issues of everyday politics. This tends to be true of most Islamic groups, but it is most noticeable among modernist groups, perhaps because one expects more doctrinal argument from them. Instead, Islamic modernist leaders have been so unclear on just how they regard the place of religious law in the state, that opponents of political Islam have frequently drawn the most dire and extreme conclusions about the harshness with which Islamic law would be applied—what with cutting off hands for stealing and the like—should Islamic groups ever assume control of the state.

Actually, however, nothing could be further from the minds of modernist thinkers. For most of them the law should become less not more rigid, drawn from the ultimate Koranic source, to be sure, but adapted and made suitable to the people who must live by it. What kinds of doctrinal and institutional problems such an effort at adaptation would give rise to receives short shrift by modernist thinkers. Interviews with two national Masjumi leaders, shortly before and after the party was abolished in 1960, indicate how short the shrift is. Both men were trained in civil law, and both have served important leadership functions in the new Partai Muslimin Indonesia.

> [The first] What is to be done with Islamic law, how it should be changed, is still an open question. There has been no really concrete thought about it. Hazairin has written about an independent *madhab* for Indonesia. The idea is catching on among Islamic leaders, but this does not mean that it has taken hold

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adat law scholar Prof. Djojodigoeno of Gadjah Mada University, stimulated some debate, but largely within Islamic circles and within civil law circles, not between them. The debates did not last long, but faded out, largely because nothing came of them in the form of policy.

> among the people. . . . [There was little evidence, however, that Hazairin's proposals were being considered carefully and thoughtfully even by most Masjumi leaders.] [Dec. 23, 1960]
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> [The second] implied by his remarks that most members of Masjumi never thought about problems of religious law very deeply. Masjumi insisted that the Islamic courts should have full competence, including executory powers, over marriage, divorce, inheritance. But party statements about the courts merely paid recognition to the problem—that is, the party is still thinking about it. But such issues haven't really been considered. He said that he and other law-trained Masjumi members always went along with party statements on these matters, because they were incidental to the real issues which Masjumi had to face. Yet he and others with comparable training understand that there is far more to the problem of religious courts and religious law than has met the eye of the general membership of the party. [July 28, 1960]

The real issues Masjumi leaders never considered to be related to fundamental reinterpretations of Islamic law or ethics or political thought. Rather, they were immediate issues of competition for political power, distribution of resources, and policy making. In or out of the cabinet—often in during the parliamentary period (1950–1957), always out after the inception of Guided Democracy in 1957—Masjumi continually faced pressing problems of daily politics that left little time for philosophical and doctrinal reflection. All that was left to the future. Nor, after the party was abolished, did the political atmosphere encourage such reflection, certainly not in public. The Partai Muslimin Indonesia has said little more on the subject of Islamic law than Masjumi did. Party ideological spokesmen and pragmatic politicians alike, while regarding the problem in different lights, have tended to push it aside.

The silence of modernist leaders on an issue as fundamental to Islam as the law can be understood partly in the light of politics along the second axis of political structure, that of the opposition between Islam and non-Islamically based political forces. The imperatives of this axis, moreover, may explain more fully the essential conservatism of Indonesian Islam.

Unlike Middle Eastern countries, but in this one respect like India before and after partition, Indonesian Islam has always suffered from a kind of minority status. Despite the fact that

Muslims are a numerical majority, Islam in Indonesia represents what is basically an under class. In India, according to Gibb, the consequence was a profound politicization of Islam:

> The student who passes from the Near East to India cannot but be conscious of a more marked political content in its religious movements. That they should include a definable social or social-economic aspect is not to deny the sincerity of their leaders or of the mass of Indian Muslims. In contrast with the Arab lands, Islam in India can never free itself from its setting over against the vast Hindu majority; and this, of necessity, forces social and political issues into the context of religious life [and, one might add, the reverse]. Moreover, the range of social and racial differences within the Muslim community suggests of itself a society in which religious attitudes are closely related to social backgrounds.[25]

With a few alterations, the statement could easily be about Indonesia, and particularly, though not only, Java. Yet, in India before partition modernist thought flew off in a variety of expansive and imaginative directions; in Indonesia it did not. The contrast between English and Dutch colonial policy may help to explain the differences; Gibb and Ahmad both agree that English influence on Indian modernism was critical.[26] It may also be that Indian Islamic history offered a memory of the greatness of Moghul authority that lent a sense of past achievement but also a sense of the need to go off in new directions, the decline being obvious, while in Indonesia no impressive victory for Islamic authority had ever really occurred.[27]

[25] H. A. R. Gibb, *Modern Trends in Islam,* p. 57.

[26] See Aziz Ahmad, *Islamic Modernism in India and Pakistan* (London: Oxford University Press, 1967), particularly the introduction.

[27] Berg, "Indonesia," in Gibb, *Whither Islam,* pp. 254–255, points out a more critical distinction. While in India Islam and Hinduism were always in conflict and could not be reconciled, in Indonesia the process of interaction between religions was quite different. "Who is to be called the victor in the battle between the animism of the simple country people and monotheistic Islam? And did Hindu-Javanism or Islam really triumph in the court circle? It would not be easy to give a completely satisfactory answer to this question. The process of syncretism, of the growing into one of two really different religious or philosophic systems under the stress of primitive thought, which Java had already once before experienced when Shivaism and Buddhism to all outward semblance contended for mastery, took place again after the introduction of Islam. It was Javanese genius, the 'agama Djawa,' after all, which, until a short time ago, was the real victor, as an uncritical unity of contraries." The

Whether or not it illuminates differences between Indian and Indonesian Islam, and it doesn't really seem to, the last point is most important for the development of Islam in Indonesia. For centuries Indonesian Islam has involved itself in a struggle for religious and political hegemony that never succeeded. Nearly everywhere it was absorbed, its symbols and rituals were taken over often with a substance that seemed puzzlingly not fully Islamic. It is not that Islam had no influence; it obviously had. The Islamic impact on Indonesia goes deep and is recognizable everywhere in a multitude of forms and essences. But seldom was Islam accepted altogether on its own terms. The critical point is that political authority did not pass into identifiably and wholeheartedly Islamic hands anywhere in the archipelago. Political elites in Java and most outer island societies remained basically syncretic in religious orientation, with an admixture that frequently favored pre-Islamic values.[28] Particularly is this true of Java, where dominant political leadership has always rested in the hands of an aristocracy whose religious beliefs, while superficially Islamic, eclectically draw upon Javanese animism, Hinduism, and Buddhism, and a variety of other accretions, including Islam. It is this leadership, represented most clearly in the party world by the PNI (Nationalists) and in a more heterogeneous way in the army officer corps and the national and regional bureaucracies, that by and large has dominated Indonesian politics since the revolution. Seldom has there been any question, at least in the minds of devout Muslims, that this elite is fundamentally non- or anti-Islamic, albeit in a variety of subtle shades stretching from moderate toleration to contempt and antagonism. The following notes are excerpted from a discussion with a Muslim modernist who for a time in the 1950s held a high position in the Ministry of Religion.

> Among the opponents of any extension of Islamic justice are the nationalists, he said. The nationalist group is not necessarily coterminous with the adat group (*kaum adat*). Actually nationalists use those who live by adat for their own ends. What

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emergence of an ideologically based party system, however, along with other social developments—urbanization, the rise of a commercially based Islamic modernist movement, and so on—began to hack the unity of contraries apart.

[28] Clifford Geertz, *The Religion of Java* (Glencoe: Free Press, 1960).

> Islamic groups fear is that the nationalists do not really accept the principle of the All-Mighty God [the first principle of the Pantjasila, the five-point statement of national doctrine]. They are willing to derogate from that principle in order to increase their own power, by destroying the power of Islam. Muslims must stand behind the principle of the one true God. Here it is that all Muslim groups stand together, in recognition of this God. He is the God accepted from the time of the Prophet Abraham, through the Christians, and finally to the Prophet Muhammad. But the nationalists are not really enamored of this God, and for the purposes of their own power and pantheist beliefs, they are willing to degrade Him. They encourage the people who live by adat in their own ancient syncretic beliefs, so that the principle of the one true God is made weak, and it follows from this that Muslim groups in Indonesia are made weak. Working with the nationalists in this cause are the Communists, who have everything to gain from weakening the belief in the one true God. . . . To the extent that their aims are the same, the nationalists and the Communists can be considered one group in the total configuration of the struggle. [August 26, 1959]

(Who are the *kaum adat,* the people who live by adat? The answer, for this man and others, is politically and socially significant. As he saw it, quite rightly, the *kaum adat* are those minor officials and village leaders who do not owe their position to Islam. Most important among them are *lurah,* village heads. But they also include landowners, who depend upon local adat for retention of the their land. In the eyes of the above informant, an urban official with ties to urban commercial Islamic groups, village officials and landowners had most to lose if Muslim groups ever came into power. But by Muslim groups here, he meant basically modernist groups.)

Indonesia's party system institutionalized the opposition between Islam and non-Islamically oriented groups. It became almost impossible for anyone to remain outside the conceptually rigid social-religious-ideological groupings, *aliran,* consolidated by the political parties. It may well be that one effect of the consequent political organizational activity was to draw off many Islamic intellectuals who might otherwise have devoted themselves to writing more or less dispassionately about problems of Islamic change. In any event, as happened to differences between Islamic traditionalism and modernism, so the cleavage between

santri and *abangan* (devout Muslim and Javanese syncretic) cultures in Java and similar cleavages elsewhere, while before rather much in flux, now were given an ideological format on a national level and fed back to village Indonesia in more forceful and contrasting terms.[29]

The grand social-religious-ideological oppositions of Indonesian politics have inclined leaders to zero-sum conceptions of conflict that permit few compromises on fundamentals. Whole world-views seem to be at stake. For Islam this has meant that in the struggle for eventual power, whatever that might mean for the character of the state later on, there can be no surrender of Islamic ground now. Every Islamic institution, every rule of Islamic substantive law, has become a symbol of major importance. They can be changed in fact, and have been as they always had been, but no symbolic recognition of change is possible. Legislation that threatens symbolically significant change, for instance on the marriage-law issue, is therefore out of the question except on Islamic terms. In Middle Eastern countries and in Pakistan, surrenders of Islamic authority have by no means been easy, but at least the political victors, state leaders, are still recognizably Muslim. In Indonesia, however, the dominant elite is recognizably hostile to Islam, not merely politically but religiously as well. No amount of Islamic symbol-waving by national political leaders, among them Soekarno or his successor, President Suharto, can convince devout Muslims that such leadership is sympathetic to Islamic goals—historically their class never has been. They belong to a quite different world-view. It is not as if Islam can give in to forces that remain Islamic in origins and in spirit even if bent upon reform—which Nasser, for example, could always argue was for the good of Islam itself.

The perception by Islamic leaders of their opposition as being essentially outside the faith has further consequences. For one thing, it has made it very difficult for Muslim leaders to air their differences nationally without showing weakness to the non-Islamic opposition. Any full discussion of traditionalist-modernist differences over the law, for example, or modernist efforts to deal with their own conceptions of the place of religious law in the modern state, might imply imperfections in the Islamic struggle that could only benefit ideological antagonists.

[29] Ibid., and C. Geertz, *The Social History of an Indonesian Town* (Cambridge: M.I.T. Press, 1965).

Islamic parties are divided and competitive, yet on questions of faith they continually deny essential differences. Muslim party leaders and intellectuals again and again in the 1950s and 1960s insisted on the unity of the Islamic struggle, even as they acted politically in altogether contrary ways.[30] Within Masjumi, before it was abolished, the same principle held. In an interview with one of the party's highest national leaders, this question came up:

> I asked whether there had ever been differences of opinion among party leaders with respect to what the future role of Islamic law ought to be and similar matters. He said no, that usually every effort was made to prevent such issues from arising, if it meant that their discussion would create friction. The party had to devote itself to creating unity, to fighting a political fight. And, too, members normally avoided problems that might cause disunity. No doubt, he said, party members have different feelings about problems of religious law and so on, but such feelings were not expressed openly in meetings, because no one wanted to cause internal battles. [Dec. 23, 1960]

So, in sum, while an ideological debate with non-Islamic forces took place that could not possibly resolve differences, there was none, or hardly any, within Islam itself that might have permitted a clearer philosophical position on religious law and politics to begin to emerge. Modernist leaders of the younger generation have begun to consider such issues since 1965, and more openly, but the same political imperatives tend to drive the resultant debates into private parlors.

Moreover, it has already been mentioned that, unlike the case in many other Islamic countries, in Indonesia no strong links were forged between modernist leaders and non-Islamically oriented politicians and intellectuals that might have strengthened modernism vis-à-vis traditionalism and even made certain kinds of Islamic institutional change more possible and likely. Some close relationships did develop, as between Masjumi and Socialist (PSI) leaders, on a number of political, social, and economic issues. And there were and are friendships. Lines of cleavage are not hard and fast and clear, particularly in urban professional

[30] See Daniel S. Lev, *The Transition to Guided Democracy: Indonesian Politics, 1957–1959* (Ithaca: Cornell Modern Indonesia Project Monograph Series, 1966).

and intellectual circles. But in public debate over ideological issues, the links quickly snap. Party alliances in the Constituent Assembly's ideological debates in the late 1950s were quite different from alliances in Parliament over nonideological issues. On Islamic issues, Islamic parties must always race back to the Islamic line, however much those behind the line disagree with one another over other essential issues.[31]

Here two related and complicating factors must be given their due. First, as one axis of political conflict crosses the other, non-Islamic parties and leaders have been able to work more closely with Nahdatul Ulama than with Masjumi-Parmusi. In part this relationship is facilitated by the common ethnic base of some major parties, NU and the PNI (Nationalists) particularly, and the predominant political leadership of the country as well.[32] In addition, while the NU has been firmly ensconced in the government and therefore has a moderating stake, Masjumi-Parmusi leaders have by and large been excluded from bureaucratic representation. Also, in ideological terms the NU has always been basically a known factor, precisely because of its doctrinal traditionalism, but modernist demands for scriptural purity and religious commitment, expressed in the style of devout

[31] Ibid., pp. 257ff. on the difficulties NU experienced with lower party levels in 1959 when debates in the Constituent Assembly on the return to the 1945 constitution turned into an issue—involving the constitutional place of the Djakarta Charter—that affected Islamic symbols. NU leaders had originally wanted to support the 1945 constitution, partly under pressure from President Soekarno and army leaders, but Masjumi had taken a stand of principle opposing it. When the Islamic issue was raised, the threat of dissidence among NU members and regional leaders compelled national NU leaders to reverse themselves and speak against the 1945 constitution.

[32] In the national parliamentary elections of 1955 and the regional elections of 1957, the NU, PNI, and PKI all drew more than 50 percent of their votes from ethnic Central and East Java. Masjumi drew only about 25 percent of its support from these two provinces, another 25 percent from strongly Islamic West Java, and 50 percent from the outer islands. The national Indonesian governing class is largely dominated by ethnic Javanese; both presidents have been Javanese. I do not mean to imply that ethnic similarity drew the NU, PNI, and (before its demise) the PKI together. On the contrary, though the Communist party long tried to allay NU fears of the PKI threat in order to isolate Masjumi, yet NU and PKI followers ended up killing one another over land and religious issues in Java. Rather, the point is that the PNI and NU, and even the PKI for a time, enjoyed a kind of cultural familiarity and certain regional interests in common from which Masjumi was basically excluded.

enthusiasm, gave Masjumi particularly the reputation of ideological rigidity, even fanaticism. In all these ways, Indonesian modernism is basically represented by an outgroup in the perspective of governing coalitions. To keep it that way, NU could be and has been bargained with against Masjumi-Parmusi. The NU's end of the bargain has consistently been security in the government and no challenge to the Islamic status quo that might excite its religiously defined clientele at lower party levels.

Second is the factor of the Ministry of Religion, an institutional form of the NU's bargain. The political and ideological ramifications of the ministry have already been discussed. It is worth emphasizing, however, that given the terms of the Islamic struggle in Indonesia, as nearly all Islamic groups perceive it, Islamic parties have had to support the Ministry of Religion. Yet, as many feared, the ministry ultimately lent Islamic legitimacy to the non-Islamic state, and in the process firmly consolidated the NU's political position. The NU and the Ministry of Religion are, in effect, agents of accommodation with the civil state, in an echo of the accommodation worked out long ago by Islamic administration with Javanese political authority. But it is a political accommodation, and the price that the civil state must pay is that it will share its potential administrative jurisidction with the Islamic bureaucracy.

How long this condition obtains depends upon balances of Indonesian political power—which have begun to change—and on the directions of Indonesian Islamic political thought. These variables are related. In the past, at least, as long as Islam remained politically competitive, even when the odds were clearly against ultimate victory, Islamic political ideas remained defensively firm against novel ideological excursions. The fear has been too great that new paths of political appeal—assuming leaders can think what they might be—would slow the Islamic struggle and dissipate it in doctrinal squabbles. And, of course, many Islamic ideological spokesmen are too deeply committed to the idea of an Islamically inspired state to be able to leave it easily.

Yet civil state symbols, or symbols anyway of a state that is certainly not Islamic, unquestionably have the upper hand in Indonesia. Not all devout Muslims imagine it that way. Some see it as an essentially *prijaji* state, one merely controlled by a non-Islamic elite. But for others, mainly more or less pragmatic

political leaders, the likeihood that the state in its present form will persist seems quite clear. The significance of this realization is different for traditionalists and modernists. NU leaders are not noticeably disquieted by the prospect, and no ideological adjustment is required from them. They need only continue to say what they have said in the past about the Islamic struggle, and do little more than maintain their party organization, in order to protect the party's bureaucratic territory in the state. In other words, for the NU, as for traditionalist Islamic groups in other Muslim countries, the Islamic state as a future goal cannot be relinquished. As a goal it retains its pristine purity. But in the meantime, pending its perfect attainment, a wide variety of political adaptations and accommodations with existing political authority are possible and necessary.

For Masjumi-Parmusi leaders, however, the problems are more obscure. Their views cannot be classified easily, because they have not always been expressed with unequivocal clarity. Some take the original fundamentalist notions of Islamic modernism very seriously indeed, others are more open on these questions, and others still, particularly those active in labor and similar functional organizations, are prepared to make their peace with existing ideological bases of the state in order to get on with the usual work of competing for economic and social resources.[33] In general, however, bureaucratic symbols of Islamic authority are less critical for modernists; some, for example, are quite willing to see Islamic courts absorbed by civil courts, even though present imperatives of the Islamic struggle still prevent them from saying it openly. Moreover, for many modernist politicians and intellectuals the Islamic law itself, so basic to most going conceptions of Islamic political goals, has begun to fade in importance. No prominent Islamic modernist writers in Indonesia have gone as far as Fyzee in suggesting that religious legal concerns ought to be shorn off and be done with. But a few politicians, young and old, are quietly but clearly moving in this direction. Gradually a concern is growing, however poorly and uneasily articulated, with the formulation of ethical and political principles rooted in Islam that may inspire the state and its leader-

[33] For a discussion of the spectrum of modernist religious-political attitudes in Indonesia, see the useful paper by Allan Samson, "Religious Belief and Political Action in Partai Muslimin Indonesia," prepared for delivery at the Association for Asian Studies meetings, March 1971.

ship. It is a very difficult task, one central problem of which is summed up in the question: What exactly is an Islamic state, or a state based on the tenets of Islam, without the law? If Islamic ethics have been traditionally bound up with the law, how are ethics and law to be separated without losing both? Two interviews with the same man, a Masjumi and then, for a time, a Partai Muslimin Indonesia leader, separated by nearly seven years, indicate how gradual and how very difficult is the process of Indonesian modernist ideological change. Trained in civil law, the man has always been pragmatic in political style, with many close friends and contacts across party lines. The first discussion took place after Masjumi was banned.

> He agreed that generally Masjumi leaders have not considered Islamic law as an absolute condition of the state based on Islam.[34] NU leaders have of course frequently said that the law is a necessary condition of such a state. When I asked what, then, is the meaning of a state based on Islam for Masjumi, he replied that for him and other leaders it means that the character of the government or state follows the essential tenets of Islam. In the state based on Islam, leaders would act according to the spirit and general teachings of the religion. . . . The consequences of a state based on Islam would not be radical in a legal sense. The change would be that the impelling motives of the state and the character of its leadership would change; the sources of motivation would be Islamic. But the law is a different matter. What the law is in Indonesia depends on Indonesian conditions and needs. But the general principles and spirit of the state would be Islamic. [Dec. 14, 1960]

The statement is typically pained and tortuous, for it is very hard to say just what the spirit of Islam is that would make things different, except that committed Muslim leaders would assume authority. In a sense, this is exactly the point, that an alternative elite, founded on Islamic appeals, would exercise authority. But the appeals themselves could not be worked out precisely without endangering their attractive power for Mus-

[34] The "state based on Islam" (*negara jang berdasarkan Islam*), rather than "Islamic state" (*negara Islam*), formula is common among the major Islamic parties, though it is not unusual to hear the term *negara Islam*. The more open and flexible idea of a state based on Islam has been especially favored by modernist intellectuals and political leaders precisely because it provides leeway for a noninstitutional conception of an Islamically inspired state.

lims. By 1967 the argument had evolved a bit. In the interim period Guided Democracy, succeeded by the military-based regime of General Suharto, had shown fairly conclusively that Islam would not ultimately win political victory in the Indonesian state.[35]

> The old Masjumi group, now the Partai Muslimin Indonesia, has been working out a new formulation of party doctrine, he said. In this formulation there is much emphasis on accepting the secular state. In the fashion of modernist exposition, he argued that, after all, the Prophet never intended to create a theocratic state; it was only his great personal influence that inclined men to create around him a basically totalitarian system. After Muhammad died, authority was to pass to the caliphs, who really represented a kind of secular government conception. Now the Partai Muslimin Indonesia will stress the need to develop good character in men, which is the purpose of Islam. The struggle will be to create men of good faith.[36] I mentioned Fyzee's arguments with respect to Islamic law, and he quickly pointed out that he too accepts this view. And when I asked whether the new formulation of principles was analogous to that of European Christian Democracy, he readily agreed, yes, that this is what he had in mind. [July 12, 1967]

It does not go much further than the original position, though the place of the civil state is now clearer, and it remains rooted in defensive modernist apologetics.

Indonesian modernism remains beset by a tension that derives not only from being out of power but from espousing ideological goals that are often unclearly formulated and apparently hopeless. Moreover, the party format of modernism continually re-

[35] The effect of this realization on NU leaders was, if anything, to make them slightly more accommodative with respect to pressures for change. It is from the time of the peak years of Guided Democracy in the early 1960s, when NU was for a time unchallenged by Islamic opposition, that party leaders began to relax their stand against legislation concerning Islamic marriage. In the period following 1965, however, though negotiations continued with Christian and other groups to work out a general marriage act along with specific religious provisions, Islamic attitudes on the issue began to tighten up again.

[36] Thus considerable effort was poured into developing Islamic educational campaigns, sermons, religious meetings, and so on, all over the country. Some leaders in the party are taking very seriously this concern to inculcate religious knowledge and understanding in the people.

strains and constricts ideological adaptation, imposing upon modernist intellectuals a constant anxiety about the effect of new concepts upon the party's clientele and its opposition. Given the structure of Indonesian political conflict, a too quick acceptance of the civil state might also imply an acceptance of present political leadership in the state, a leadership that traditionalists find easier to live with in Islamic terms than do devout Muslim modernists.

The likelihood of further accommodation between Islam and the state depends on several factors other than political structure and Islamic political thought. One is economic. Government policies that tend to favor Islamic entrepreneurial groups will probably encourage further political and ideological adaptation on the part of Islamic modernists. It is not at all certain, however, that consistent policies favoring domestic commercial circles will develop, nor, if they do, that they will benefit the Islamic business stratum. Another factor of critical importance is the general level of religious stress and conflict. In the period after 1965, for example, increased tension between Christians and Muslims, flaring at times into violence, served to tighten up already defensive Islamic sensitivities. A third factor is Islamic politics at the local level, to which national Islamic leaders must respond but which they cannot fully control.

At lower than national levels of thought and action, the struggle between Islam and adat continues, often in novel form.[37] Religious conflict, intertwined with social, political, and economic interests, is constant and volatile. In Java religious or religiously interpreted tension throws up a variety of religious variants, some of them denying Islamic beliefs altogether and rejecting such accommodations as those which *abangan* (Javanese syncretic) society and Islam had already worked out.[38] After Islamic groups massacred large numbers of Javanese peasants in the anti-Communist purge following the attempted coup of 1965, many people evidently converted explicitly to an Indonesian variant of Hindu-

[37] In his study of adat and Islam, Prins remarked in conclusion that he handled the material in the manner of a war correspondent, an apt characterization. J. Prins, *Adat en Islamietische Plichtenleer in Indonesie* (The Hague and Bandung: van Hoeve, 1954), p. 149. But it is a war of a hundred (or more) years, with numerous fronts and mixed weapons.

[38] See, for example, the enlightening article by Harry J. Benda and Lance Castles, "The Samin Movement," *Bijdragen tot de Taal-, Land- en Volkenkunde* 125, no. 2 (1969): 207–241.

ism, which appears now to be growing stronger in Java. On the Islamic side of the religious continuum, demands recur now and again for a full realization of the Islamic state. The Darul Islam of West Java, Atjeh, and South Sulawesi, in rebellion off and on for years until the early 1960s, was the outstanding effort. Outside of Java the Darul Islam rebellions, and less spectacular movements, have developed in the context of local struggles for power in which Islam is a major symbolic impetus opposed now less explicitly by adat symbols than by the grander universal of the "secular" state.

The desultory decline of adat as an attractive symbol of Indonesian identity—local adat implying a disunity that is discomfiting for national leaders—seemed for a time to favor Islam. Islamic leaders at least understood the matter in this way. But in the provinces local adat remains a powerful symbol not only of defense against national homogenizing pressures but also of opposition to Islam. In the same way that Islam was strengthened by its incorporation into a national political format, however, so the adat opposition to Islam has turned to the civil state and its institutions for protection. It is in this sense, as well as others, that the term "secular" is so misleading. Significantly, the potential strength of national civil law, at least as symbol, results from social and religious conflict at local levels.

In some areas such conflict is more complicated than in others, the relationship between local adat, Islamic, and national legal institutions and symbols becoming extraordinarily intricate, tense, and delicate. Again the best example is Atjeh, where Islam appears to have the upper hand in regional politics. Atjehnese Islamic power groups have continually insisted upon a rather full implementation of Sjariah rules in the area. Religious courts have been more active there than anywhere else in the country, extending their jurisdictional reach much farther than existing statutes justify, though not as far as many Atjehnese Muslim leaders think right and necessary. What they seek is not merely fulfillment of the faith, their commitment to which is profound, but also perhaps a kind of insurance for Atjehnese ulamas against the resuscitation of *ulèebalang* adat authority in other forms.[39]

[39] On the relationship between the traditional *ulèebalang* group and Islam in Atjeh, see J. Siegel, *The Rope of God* (Berkeley and Los Angeles: University of California Press, 1969). After the attempted coup of 1965 incidents occurred in Atjeh and also South Sumatra in which judicial

Yet the application of Islamic legal rules in Atjeh—their purview has been debated again and again in the regional legislative assembly—is limited by the qualification that Islamic law may be implemented only so far as it does not conflict with state law (*hukum negara*). Local army commanders and national officials have insisted upon this caveat. It follows from the assumption of legitimacy of the Indonesian state, and to challenge it seriously must imply a breach of the local association with the national enterprise. But such a breach would also undoubtedly result from a concerted effort to push back Islamic law in Atjeh.

Nationally and locally, a tense integration exists between Islamically and non-Islamically oriented political and social forces. This integration has been facilitated by the Ministry of Religion, which incorporates Islamic bureaucratic services into the state, though ambiguously and uncomfortably from the point of view of both devout Muslims and those who are hostile to political Islam. It is not an all-encompassing integration by any means, nor is it sufficient to prevent violent conflict from breaking out, all the more so when other economic and political causes encourage it.

One price of such structure and the ideological supports of it is a deep-seated conservatism within Indonesian Islam and in the relationships between Islam and the state. Relative political stability requires the ascendancy of traditionalist Islamic groups willing to live with and find advantage in the existence of a "civil" state, controlled by traditionally anti-Islamic forces, that will allow Islam a significant political and institutional pocket. And this in turn requires the relative isolation of Islamic legal institutions, which have had to be protected from pressures for rapid change both by civil institutions and by other Islamic groups.

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institutions became the vehicle of expression for issues of religious conflict. In Atjeh the regional legislative council insisted that Christian judges must not try Muslims, and the whole matter of Islamic law for Atjeh opened up wide again. In South Sumatra local civil judges refused to participate in a state ceremony in which only Islamic prayers would be read, arguing that the Indonesian state comprised religions other than Islam. The incidents, though exaggerated in Djakarta, were significant enough to stimulate a trip to the provinces by the chairman and vice-chairman of the Supreme Court. Apparently a certain amount of purely local rivalry among civil judges themselves was also involved in these affairs, but the symbolic significance was nevertheless unmistakable, and it was this that caused a good deal of worried talk in Djakarta.

Such relationships are not necessarily permanent. But how they change depends on the ability of traditionalist and modernist groups, in all their variety, and on the ability of their various kinds of antagonists, to push beyond their present political and intellectual positions and to develop new political and intellectual coalitions. So far, the opposition between Islamic modernists and non-Islamically inclined elites has given traditionalist Islam a distinct advantage in Indonesia. The tacit alliance between Muslim traditionalists and those who have dominated Indonesian politics, while not always friendly and smooth, has nevertheless been based on mutual interest and therefore has been relatively stable. In an important sense, as the governing elite itself from 1950 through the present has consisted of basically traditionalist (in an Indonesian rather than an Islamic context) or at least rather conservative groups, the alliance is in general a conservative one. This has not always been recognized. The surface radicalism of Guided Democracy, and as well the development emphases of the post-1966 New Order, have masked the essential stability of class relationships and the unwillingness of ruling groups to consider any fundamental changes in social and political structure. Indeed, the basic tendencies of national governing elites, both civil and military, have consistently been to strengthen bureaucratic conceptions of governance that must reinforce rather than threaten existing class relationships.[40] In this sense, there has been a fundamental consistency in the political systems of precolonial, colonial, and independent Indonesia. One element in the implicit rationale of this pattern of governance has been a concern to prevent the rise of powerful local Islamic groups, or at least to confine such groups, once risen, to their localities. The early profederalist arguments of Masjumi represented an Islamic (and also regionalist) attempt to break out of the pattern, just as the successful antidecentralization arguments of both Soekarno and military political leaders sought to reinforce it.[41]

[40] For an elaboration of the point that the dominant conception of governance in Indonesia has been bureaucratic, see Harry J. Benda, "The Pattern of Administrative Reforms in the Closing Years of Dutch Rule in Indonesia," *Journal of Asian Studies* 25 (1966): 589–605.

[41] As Professor Benda has argued in a personal communication, the relative decentralization of the parliamentary period, from 1950 through early 1957, did in fact lead to accretions of power for Islamic groups. Similarly the considerable strength of Islam in Atjeh is related to the

This pattern has been strengthened, if anything, by developments in Indonesian politics since the attempted coup of 1965. But these same developments, by changing the structure of national organizational politics (in contrast with class politics), have produced a potentially fundamental change in the relative power of Islam. The consequences may prove to be profound enough to deserve comment here as a postscript to some of our analysis of the relationships between Islamic legal institutions and politics.

What happened was that the military-based New Order, which succeeded Soekarno's Guided Democracy, set about consolidating its power in ways that were nearly unimaginable before. Most important, the political party system, which epitomized and gave rather full expression to the potential for social-religious conflict in Indonesia, was pushed aside effectively as a determining force in Indonesian politics. Soekarno had wanted to do this, but failed for lack of an organizational base. The army had the organizational power. Moreover, the aftermath of the coup not only had wiped out the Communist party and ultimately removed Soekarno from power, but had left the PNI very weak and most other political organizations of the past deeply exhausted. Of the major parties only the Nahdatul Ulama remained relatively well organized with a large and loyal following. But the army, led by President Suharto, was (and is) unquestionably in control. Army leaders soon developed their own

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granting of autonomy to that area. All governments in independent Indonesia have been sensitive to this problem of local Islamic pressures. Most recently, since 1965, the example of Atjeh led a few other areas, particularly in South Sulawesi and parts of the Lesser Sunda islands, to try to legislate Sjariah law into effect. The central government was deeply concerned about this and sent representatives to these regions to persuade them that such action was inconsistent with national policy and could not be tolerated. Later, in the drafting of the new election law for parliament and regional councils, the government successfully pressed for a larger proportion of appointive seats precisely in order to be able to counter any such tendencies in the future. Political parties were of course opposed to increasing the proportion of appointive seats, but non-Islamic party leaders were brought around in part by the argument transmitted to them privately that this was necessary in order to keep local Islamic groups in check. This information is based on personal interviews during August 1971. See also *Pemilihan Umum 1971: Undang-Undang dan Ketentuan-ketentuan Pelaksanaannja* [General elections of 1971: laws and stipulations for their implementation.] (Djakarta: Pantjuran Tudjuh, 1970).

political organization—the Sekretariat Bersama Golongan Karya (Sekber Golkar) or Combined Secretariat of Functional Groups —which drew together a variety of nonparty groups, civil servants, and some intellectuals, all held together by the reality of the military's control. Political parties were given little opportunity to revitalize themselves, even if they were so inclined and knew how. Army leaders intruded in the affairs of both the PNI and the newly formed Partai Muslimin Indonesia, playing an important part in the selection of new leaders for these two parties. In the case of Parmusi, President Suharto forbade former Masjumi leaders, who had been elected by the party, to take office, and instead imposed a new leadership amenable to government persuasion.[42] Where direct interference was not easy or advisable, government tactical funds were used with considerable success to win support for the government or at least to neutralize opposition. Finally, in July 1971, parliamentary elections were held. The outcome appears to have been largely determined by the advantages of military power, opulent financing, and some measure of intimidation, as well as the weakness on most scores of nearly all the political parties. The Golkar organization, campaigning under the symbol of national development, won an overwhelming victory with over 62 percent of the vote. Of the nine political parties that also ran in the election, Nahdatul Ulama proved the strongest with over 18 percent of the vote, while the PNI won less than 7 percent and Parmusi over 5 percent. Absolute control of Parliament and most regional legislatures fell to Golkar, of course, even without the appointive seats in the national Parliament allotted to military representatives.[43] Never before in the history of independent Indonesia had a single group, even one as diversely put together as Golkar, dominated a parliament.

For our purposes, what is important in all this is that Is-

[42] For a review and discussion of these events, see Harold Crouch, "The Army, the Parties and Elections," *Indonesia* 11 (April 1971): 177–193.

[43] The total vote of the four Islamic parties was 27 percent, entitling them to 94 of the 360 elected seats in Parliament. Golkar alone won 236 seats. The PNI won 20 seats, the Catholics 3, and the Protestants 7. An additional 100 Golkar seats are appointive, 75 of them to military representatives. These statistics were taken from official reports of the election results mimeographed by the Indonesian Election Committee in early August 1971.

lamic groups sustained a devastating, undeniable defeat. Some NU leaders, like those of other parties, excused the defeat on grounds of government-army-Golkar tactics, which to some extent they protested during the campaign, occasionally with bitterness. But in wider perspective the elections merely confirmed what most politicians, and nearly everybody else, knew already: that political power rests securely with the armed forces, and that this realistically requires a measure of adaptation for the sake of survival. Despite its strong showing under poor conditions, the NU was not much better off politically than other parties. The nature of the game had changed. It had become abundantly clear, perhaps once and for all, that the old goals of the Islamic struggle were in fact a mirage.

The problem is, however, exactly how much has the game changed, and what kinds of adaptation are necessary and possible. Some changes that have already been imposed by the government may have far-reaching consequences for the Ministry of Religion and the Islamic bureaucracy. Barely were the elections over when, in a minor cabinet reshuffle, President Suharto broke a tradition of nearly twenty years by appointing a non-Nahdatul Ulama member, Professor Mukti Ali, as Minister of Religion. Mukti Ali, who taught at the State Islamic Institute of Jogjakarta, is closely linked with neither the NU nor the modernist Muhammadijah, though he is more inclined intellectually toward the latter. With long experience in Pakistan and two years at McGill University, his ideas for Islamic reform basically go beyond most current Indonesian Islamic thinking. He was appointed, partly under the urging of reform-minded Islamic student organizations, as a kind of technician of spiritual affairs, comparable to the economic experts in the government, who would bring the Ministry of Religion into line with the needs of development. The NU evidently was startled by the appointment, and government leaders no doubt hoped that the move would serve as a warning to the party that it must not cause trouble.

But two things are noteworthy about this development. One is that it was not really so radical. Although the NU was hurt, the government was not about to hammer Islam into the ground, as some anti-Islamic leaders wanted. On the contrary, President Suharto and his advisers were quite subtle in approach. They went out of their way to avoid threatening devout Mus-

lims with a general attack on Islamic institutions. There was no suggestion, for example, that the Ministry of Religion itself would be abolished. And at the same time, government leaders hinted that important positions in the government would still go to the Nahdatul Ulama.[44] The "alliance" between governing groups and the Nahdatul Ulama was not to be broken, only shaken up and perhaps widened a bit. Most NU leaders were inclined to go along. A few took the hard line that perhaps NU ought not to associate itself too closely with the government. But a party newspaper editorial embraced the dominating line pronounced by party general chairman Idham Chalid:

> Whether people like it or not, the position has been stated time and again. The Nahdatul Ulama has never thought of placing itself in opposition. . . . This has always been the view of the NU. It has participated in every Government of this Republic. . . . As long as it is named the party of the Ulamas, then co-operation between Ulama and Umara [government] is absolutely needed by the *ummat*. . . . And men may regard the matter as they will, but for the NU itself this attitude seems right and in accord with the reasons for forming the party.[45]

Second is the possibly more significant point that not all bureaucratic leaders in the Ministry of Religion were terribly upset by the apparent threat to their party. Many undoubtedly were, but there were others who had long begun to feel that the Islamic bureaucracy was well enough established to get along fine, as part of the state bureaucracy, without the political protection of the NU. Indeed, for some the NU had become an obstruction to the further development of Islamic bureaucratic institutions. In this view, the party had served its purposes of sheltering the consolidation of the religious bureaucracy in the independent state. Now it was no longer absolutely necessary in the interests of the Islamic community, and in fact might become a liability, threatening to drag the Islamic bureaucracy down with it.

It is much too early to say, but conceivably this incipient

[44] Most important, NU party chairman Idham Chalid was later chosen Speaker of Parliament with the support of Golkar.

[45] *Duta Masjarakat*, October 26, 1971. Subchan, first vice-chairman of the party, represented the harder-line view, and a struggle is likely to ensue in the party that will take some time to resolve. But the government is naturally inclined to support the Idham Chalid wing of the party.

"liberation" of the Islamic bureaucracy, to the extent that this is what it is, may open it up considerably to new winds of change. Minister Mukti Ali himself began almost immediately to push for fundamental changes in Islamic education, particularly in the NU stronghold of *pesantren* schools.[46] Mukti Ali's own writings, decidedly modernist in orientation, are likely to receive a good deal more careful attention than in the past. Trends toward establishing standards of bureaucratic merit may be accelerated, though not without complaint and opposition. With respect to Islamic law and the practice of Islamic courts, old reform ideas may soon gain slightly more purchase than they have had in the past, and the Directorate of Islamic Justice may feel less inclined to go slow in bringing pressure to bear on Islamic courts.

None of this is meant to suggest that Indonesian Islam is about to experience a fundamental transformation. Much that has been on the verge of happening may now begin to happen. But the Nahdatul Ulama remains influential, and the potential threat of Islamic reactions must always be considered by government leaders. Moreover, these government leaders are not yet likely to permit the NU to suffer very much if it means that other, less acceptable, wings of political Islam will become stronger. National political leaders have an interest in changing —or "modernizing," as many would have it—Indonesian Islam, but not in letting it get out of control. This interest dictates a careful and subtle, but continued, relationship with traditionalist Islam.

Yet, the restraints of politics aside, a breakthrough in the condition of Indonesian Islam may now be occurring, albeit one that is too recent to encourage anything more than wild speculation. The changed structure of power has stimulated a sense, on the part of many who are politically conscious, that Islam can no longer wield significant political influence at the center

[46] Islamic education receives about 70 percent of the Ministry of Religion's budget, and all sorts of irregularities have been allowed to develop in the office of Islamic education. Protests about these conditions have been common, especially but not only in Islamic circles. This, along with Mukti Ali's own interest in education and the government's hope to introduce a development orientation in Islamic schools, dictated concentration on Islamic educational problems as a matter of first priority. For a comment on Mukti Ali and his approaches as minister, see *Tempo* [Time], October 2, 1971.

in Djakarta. The growing belief that Islam is on the decline as a political force may be beginning to effect a kind of cultural liberation of Islam itself and, also, those who have always feared and opposed Islam on political grounds. Within Islam changes are occurring, changes which were potential but which could not occur as long as political Islam seemed powerful and which are encouraged by the notion that it may be growing weaker. Among young urban Islamic leaders, for example, those associated with the modernist Himpunan Mahasiswa Indonesia, an already strong urge has grown stronger to free themselves from the confines of Islamic political ideology in order to begin to define an Islamic cultural and religious commitment that lends identity without restraining them from participating in national development.[47] National development itself has become a key symbol of post-1965 politics, commitment to which allows participation in the government and at the same time encourages departure from older religious conflict conceptions of the political order.

It follows that the issues of politics appear to be changing, not completely and not without lag and perhaps only for the time being, and this relaxes the Islamic struggle and reassures those who once were caught up in the task of holding Islam at bay. Again, for many opposed to political Islam this has been culturally liberating. As a minor example with important implications, there are many who in the past would simply not consider attending such religious obligations as the month of fast during Ramadhan, because to do so would have implied, to others and to themselves, a political identification with Islam. In very recent years, however, one gets a strong impression (no

[47] See the lead article on the challenge to Islamic parties in *Tempo*, August 21, 1971. Also the very significant challenge to Islamic political thinking and action in Indonesia by the then chairman of HMI, Nurcholis Madjid, "Keharusan Pembaharuan Pemikiran Islam dan Masalah Integrasi Ummat" [The necessity of renovating Islamic thought and the problem of the integration of the *ummat*] in Madjid, Djaelani, Metarieum, and Anshari, *Pembaharuan Pemikiran Islam* (Djakarta: Islamic Research Centre, 1970). See also the book by H. M. S. Mintaredja S. H., the new chairman of Parmusi and Minister of Social Affairs, *Masjarakat Islam dan Politik di Indonesia* [*The Islamic community and politics in Indonesia*] (Djakarta: Permata, 1971). These writings, which have received considerable attention, and a few others represent views and analyses that were seldom discussed publicly before the present period in Indonesia, though they are hardly unusual in other Islamic countries.

more than that) that a remarkable number of such men and women are undertaking the fast almost enthusiastically, even enjoying it in a religious sense, occasionally praying at the mosque, and in general looking at Islam, not with religious fervor by any means, but in a different and somewhat brighter light.[48] There is no sense in trying to make too much of this now in our discussion. But it is probably worth suggesting that pressures for change in Indonesian Islam that have been restrained by a sense of political necessity may now develop rather more rapidly, precisely because concepts of political struggle, and therefore of political goals, are being forced to change.

Law is many things, serves many functions in society, and can be usefully defined in many different ways. In the perspective of this study, legal systems are the instruments of political and social systems. By legal system and law I do not mean formal structures and rules alone, though these are included, but also how structures and rules are understood, variously used, manipulated, accepted, avoided, and so on, along with all the informal structures and modes of action that this kind of definition implies. Not least of all, legal systems and law are symbols, and what they are symbolic of, *inter alia*, is authority, not necessarily coercive authority, but social and political authority which by its legitimacy, its social rightness, earns loyalty and a measure of compliance.[49]

Where legitimacy is divided, loyalty and compliance are

[48] This concluding section is being revised in Djakarta, late in October 1971, when the month of fast is under way. The observation that many more people seem to be fasting is not mine alone. It might be argued that some men are simply trying to gain political capital by fasting, but this is obviously too narrow a view. The analysis suggested in the text has been confirmed by the personal accounts of several friends, associates, and passing acquaintances. It is hard to judge at this point, though, just what all the implications are. At the same time, one has to be aware of the equally impressive rise in influence of *kebatinan*—religious mysticism—movements that have been traditionally opposed to Islamic doctrine. They are particularly strong in Java, where *kebatinan* represents a kind of pre-Islamic and syncretic fortress against the incursion of Islamic influence.

[49] On the symbolic functions of law, see among others Thurman Arnold, *The Symbols of Government* (New York: Harcourt, Brace, 1962 edition); Murray Edelman, *The Symbolic Uses of Politics* (Urbana: University of Illinois Press, 1967); Michael Barkun, *Law Without Sanctions* (New Haven: Yale University Press, 1968).

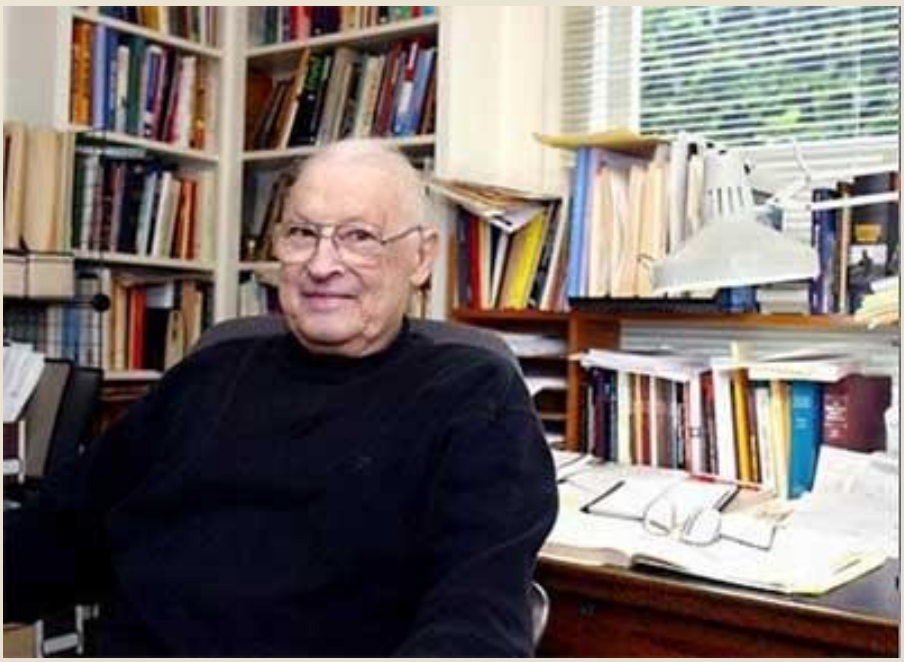
also likely to be divided in some way. According to contemporary concepts of political integration, such a situation is unacceptable or, at least, deeply worrisome, as it is for state leaders. The idea of the state implies a monopoly of legitimate authority and coercive power. The implication, however, is achieved only as myth; it need only be believed, not realized. But just as coercion is not the most important ingredient of compliance, neither is a monolithic source of legitimacy an absolute condition for the existence of a state. A state may in fact have to persist without it. The character and quality of political life in a society where myths of legitimacy are plural probably depends upon how these myths are cognitively and institutionally related, during any historical period, in a working political order. Such relationships naturally change over time under the influence of patterns of economic, social, and political change. Political outcomes may include brutal internal warfare or constant but relatively peaceful tension.

Indonesia's dual legal system may be interpreted in two different lights, neither one exclusive. The more tempting one, because it seems obvious on the surface, is that the civil and religious legal systems reflect competing political principles and sources of legitimacy that cannot, or will not, be tolerated for very long. Civil institutions, already ascendant, will eventually expand their authority over areas of life now controlled more or less by religious institutions, subjugating Islamic administration and religious law to the overriding principles of state legitimacy and bureaucratic integrity. Historically, this kind of evolution is dominant, and it is likely in Indonesia too, in one form or another.

In the meantime, however, another interpretation is one in which the functionally distinct legal systems represent competing principles of legitimacy that are related in an overarching political order that is itself legitimate. Essential to this interpretation is a concept of conflict as the means through which people perceive their relationship with the political system and, through the political system, with the state. Conflict may serve to create a sense of closer social relationships.[50] But in addition conflict may mediate the way in which people understand the political order itself. That is, men may perceive their participa-

[50] L. Coser, *The Functions of Social Conflict* (London: Routledge & Kegan Paul, 1956).

tion in a political system in terms of their conflict with other members of the political system, in something like a moiety structure. The notion should not be carried too far, because state institutions are not like those of smaller societies. They tend not toward the sharing of authority and conceptual pluralism, but toward monopolistic expansion and conceptual unicity. Even so, the existence of an Islamic legal order along with a civil legal order in Indonesia, while representing religious-social-political cleavage, also relates such cleavage to a complicated political order that men think of as Indonesian.



Glossary

Abangan	Javanese syncretic religious orientation, nominally Islamic; in contrast to Santri (devout Muslims)
Adat	Custom
Adatrechtpolitiek	Colonial adat law policy
Akad nikah	Marriage contract
Anak angkat	Adopted child
Ashabu'l-fara'id	Nonagnatic kin for whom a share of inheritance is stipulated in the Koran
Badan Penasehat Perkawinan dan Penjelesaian Pertjeraian (BP4)	Marriage Reconciliation Board, organized at kabupaten level
Badan Penjelidikan Kemerdekaan Indonesia (BPKI)	Investigatory Committee for Indonesian Independence; established by Japanese occupation government to discuss problems prior to the creation of an independent state
Baitulmaal	Islamic affairs treasury
Biro Peradilan Agama	Bureau of Religious Justice; predecessor of Direktorat Peradilan Agama
Bupati	Regent; administrative head of a kabupaten

Burgerlijke stand	Civil registry
Chul'	Payment by wife to husband for a repudiation
Dewan Perwakilan Rakjat (DPR)	People's Representative Assembly; national parliament. DPR-GR (Gotong-Rojong: mutual help) was the parliament of the Guided Democracy period
Executoire verklaring	Declaration by a civil court that a religious court decision may be executed
Faraid'l	Inheritance rules of Koran
Fasach	Judicial dissolution of a marriage on grounds stipulated in Islamic law
Fasid	Annulment of marriage
Fatwa	Advisory opinion
Gono-gini	Community property in marriage
Gunseikanbu	Military administration headquarters during the Japanese occupation
Hadanah	Child support
Hadiths	Traditions of Prophet Muhammad
Hak	Right
Hakam	Representative of spouse or arbiter in sjiqaq cases
Hakim	Judge
Hibbah	Gift from a heritable estate
Himpunan Mahasiswa Islam (HMI)	Modernist Islamic Students Association
Hizbullah	Islamic para-military organization during the revolution
Hukum	Law
'Iddah	Time of three menstrual periods following divorce
Ijtihad	Innovation, referring to the argument against taqlid that religious law may be changed
Institute Agama Islam Negeri (IAIN)	State Islamic institutes at the university level
'Iwad	Payment by wife to husband making a repudiation final
Kabupaten	Administrative district, several of which make up a province

Kadi	Islamic judge
Kantor Urusan Agama (KUA)	Religious Affairs Office
Kauman	Devout Islamic district of a city
Kementerian Agama	Ministry of Religion; later Department of Religion
Kerapatan Qadi	Islamic court of South Kalimantan
Ketjamatan	Sub-district
Kewedanaan	An administrative district, now abolished
Kijai	Honorific title for Javanese Islamic notables
Komite Nasional Indonesia Pusat (KNIP)	Central Indonesian National Committee; parliament of the revolutionary period
Landraad	Colonial first instance civil court
Lebai	Village religious official
Lurah	Village head
Mahkamah Agung	National Supreme Court
Mahkamah Islam Tinggi	Islamic appeals court for Java and Madura
Mahkamah Sjariah Propinsi	Islamic appeals court outside of Java
Mahr	Dower payment by husband to wife
Masjumi	Major modernist Islamic party; banned in 1960; predecessor of Parmusi
Maskawin	Dower payment by husband; mahr
Muhammadijah	Modernist educational and social foundation, established in 1912
Murtad	Apostate from Islam
Mut'ah	Divorce gift from husband to wife
Nafkah	Marital maintenance
Nahdatul Ulama (NU)	Major traditionalist Islamic party
Nikah	Marriage
Nusjuz	Marital disobedience by a wife
Pamong Pradja	Regional bureaucracy organized under the Ministry of Internal Affairs
Panitera	Court clerk
Panitia Persiapan Kemerdekaan Indonesia (PPKI)	Preparatory Committee for Indonesian Independence; successor to BPKI

Pantjasila	Five-point statement of national ideology, including Belief in The One God, Nationalism, Humanism, Democracy, Social Justice
Partai Muslimin Indonesia (PMI, Parmusi)	Successor party to Masjumi
Partai Nasional Indonesia (PNI)	Indonesian Nationalist Party
Partai Sarekat Islam Indonesia (PSII)	A small Islamic party
Partai Sosialis Indonesia (PSI)	Indonesian Socialist Party
Pegawai	Official; office employee
Penetapan Pemerintah	Government decree
Pengadilan Agama (PA)	First instance Islamic court
Pengadilan Negeri (PN)	First instance civil court
Pengadilan Sjariah	Sjariah court; first instance Islamic court
Pengadilan Tinggi	Civil appeals court
Pengawas Peradilan Agama	Provincial administrative supervisory agencies of Islamic justice
Penghulu	Administrator of mosque, often serving other religious functions as well
Penghulu-gerecht	Penghulu-court, by which name Islamic courts were designated officially after legislation of the 1930s
Pentjatat Nikah, Talak, Rudjuk	Registrar of Marriage, Repudiation, and Reconciliation
Peraturan pemerintah	Government regulation
Perdamaian	Compromise settlement of a dispute
Perhimpoenan Pengoeloe dan Pegawainja (PPDP)	Association of penghulus and their staffs; established in the 1930s to oppose colonial policy toward Islamic courts
Persatuan Tarbijah Islamijah (PERTI)	A small Islamic party
Persatuan Ulama Seluruh Atjeh (PUSA)	Major Islamic organization in Atjeh
Pesantren	Religious school
Piagam Djakarta	Djakarta Charter, drafted in 1945

	as a compromise between Islamic and non-Islamic political groups; incorporated as preamble to the constitution, but with key phrase on Sjariah deleted
Pondok	First-level Islamic school
Priesterraden	"Priests' Courts," as Islamic courts were conceived by the colonial administration in the late nineteenth century
Prijaji	Javanese aristocracy, bureaucratically based
Putusan	Decision
Raad agama	Popular term for Islamic courts during the colonial period
Ramadhan	Month of fasting
Rapat besar	Customary law court of South Sumatra
Rapat ketjil	Lower customary law court of South Sumatra
Rapat tinggi	Customary law court of appeals, Palembang, South Sumatra
Riddah	Apostasy
Rudjuk	Reconciliation of divorced couple; taking back of wife by husband
Santri	Devout Muslim
Sanyo Kaigi	Japanese occupation council of advisers to the military administration
Sedakah	Charity
Sjariah	The body of Islamic law
Sjiqaq	Condition of irreconcilable breakup of marriage
Sooryo Hooin	Japanese occupation term for Islamic court
Surat nikah	Marriage certificate
Surat tanda tjerai	Certificate of divorce
Syumubu	Department of Religious Affairs during the Japanese occupation
Talak	Repudiation of wife by husband
Talak ba'in besar	A repudiation of wife by husband that is final, allowing neither reconciliation (rudjuk) nor remarriage unless the woman first

	marries and is divorced by another man
Talak ba'in ketjil	A repudiation of wife by husband that does not allow reconciliation but does permit remarriage
Talak kinajah	An implied repudiation
Talak radj'i	A repudiation that allows reconciliation
Talak satu	A first repudiation, allowing reconciliation
Ta'lik ad talak	Statement by husband of conditions, violations of which are sufficient cause to justify wife's demand for divorce
Taqlid	Principle of submission to the established doctrines of Islamic law
Tihoo Hooin	Japanese occupation term for first instance civil court
Ulèebalang	Atjehnese aristocracy
Ummat (Ummah)	Community of Muslims
Undang-undang	Statute, law
Wakaf	Religious foundation, usually in the form of donated property
Wali-hakim	Appointive guardian of bride
Wali-mudjbir	Guardian of minor child
Wali-nasab	Nearest male kin of bride who may act as her guardian
Wali-tahkim	A guardian of the bride, appointed by the bride and bridegroom themselves in special circumstances
Wasiat	Will, testament

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